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Supreme Court of the United States

OCTOBER TERM, 1968

No. 1287

ESSO STANDARD OIL S.A.,

Petitioner,

against

SS. GASBRAS SUL

and

A/S SOBRAL, as Owner of the SS. GASBRAS SUL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit on November 29, 1967, which reversed a judgment in favor of the plaintiff for $62,733.12, entered in an admiralty action tried without a jury in the United States District Court for the Southern District of New York, and dismissed that action.

Opinions Below

The opinions of the District Court and the opinions and memorandum orders of the Court of Appeals are appended hereto. Also appended are the petitions for rehearing and reconsideration in the Court of Appeals (omitting the "Appendix of Guatemalan Law" from the first rehearing

petition), and the initial pages of the brief of the respondents (hereinafter referred to as the "respondent"), filed in the Court of Appeals as the "Appellant's Brief."[1]

The opinion of the District Court, dated July 10, 1964, is reported at 239 Fed. Supp. 212. The further opinion of the District Court, dated February 9, 1967, which is unreported, concerns only the computation of damages and is not in issue on this petition. Both opinions of the Court of Appeals are reported at 387 F. 2d 573.

Jurisdiction

The jurisdiction of this court to review the judgment of the United States Court of Appeals for the Second Circuit is invoked under 28 U.S. Code § 1254(1).

The judgment of the Court of Appeals sought to be reviewed was entered, with an opinion, on November 29, 1967, and a timely petition for rehearing, filed by the petitioner, was denied on January 4, 1968 in an additional opinion. The Court of Appeals, on February 6, 1968, denied a further timely petition to reconsider the decision of January 4, 1968, and for a rehearing *en banc*, without opinion.

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[1] This petition for certiorari (with respect to the "findings of fact" questions) is based primarily on the express admission in the Appellant's Brief" that "The facts as found by the Trial Court, are not contested on appeal" and that the "Appellant accepts the findings of fact made by the Trial Court." The Assignment of Errors (a requisite part of the record by the rescinded subdivision I, K of Admiralty Rule 49, 254 U.S. 701) has been abolished and the brief replaces that part of the record to show the issues disputed on the appeal. Ever since the promulgation of the Federal Rules of Civil Procedure, "The precise statement of the issues presented by the appeal is to be made in the brief." Advisory Committee's Note to subdivision (b) of the 1966 revision of Rule 75 of the Federal Rules of Civil Procedure. To the same effect is Rule 17(a) of the Rules of the Second Circuit which requires appellant's brief to state the "errors claimed."

Questions Presented

1. Whether findings of fact of the District Court which are unchallenged and are expressly stated to be accepted and not contested by the appellant are conclusive on the Court of Appeals?

2. Whether the Court of Appeals may substitute its own findings of fact for the conceded findings of the District Court and thereupon conclude on general concepts of prudence that the determination of the respondent's negligence is reviewable and reversible as a question of law?

3. Whether Rule 52(a) of the Federal Rules of Civil Procedures prohibits the Court of Appeals from setting aside such conceded findings of fact?

4. Whether Rule 44.1 (effective after the trial and decision of the District Court, but before the final judgment and the appeal therefrom) required the Court of Appeals to determine the foreign (Guatemalan) law, concerning the issue of liability without fault, without regard to any burden of persuasion respecting such foreign law in the traditional sense of burden of proof.

Rules and Statutes Involved

The order of this court, dated February 28, 1966, which adopts the 1966 amendments to the Federal Rules of Civil Procedures pursuant to 28 U.S. Code, § 2072, and rescinds the "Rules of Practice in Admiralty and Maritime Cases", is reported at 383 U.S. 1031. It was originally printed in the paperback preliminary reprint of 384 U.S. Part 4, and it reads in part:

> "2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all

further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies."

Amended Rule 1, 383 U.S. 1039:

"Scope of Rules.

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

New Rule 44.1, 383 U.S. 1055:

"Determination of Foreign Law.

"A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law."

Rule 52.(a), which, by reason of the above order and amended Rule 1, is directly applicable to this admiralty case:

"Findings by the Court.

"Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

The basic provisions of the Accident Law of Guatemala, are Articles 1 and 3 of the Legislative Decree No. 1827 (May 1932), as amended by Decree No. 178 (October 1945) and Decree No. 1051 (April 1954), which, in the agreed translation, read in pertinent part as follows:

"Article 1—The railroad, steamship, tram, automobile, airplane companies and the owners of any means of transportation, by land, water, or air, shall be severally responsible in civil action, with the perpetrators or accomplices for the damages and losses that are caused by the persons entrusted with the vehicles even when the person that causes them is not an employee of said companies or enterprise, provided the person in charge of the vehicles had entrusted them to another even in a transitory manner."

* * *

"Article 3—The responsibility referred to in Article 1 of this decree ceases when it is proved that the damaged party has given rise, intentionally, to the resulting damage or loss, or when he acted in manifest violation of the regulations issued by the Executive Branch with respect to public services of transportation. Those obligated to the payment of the indemnification shall be the only ones called upon to prove this defense."

The agreed translations of the aforementioned Legislative Decrees No. 1827, No. 178 and 1051, including the preambles which have been urged to question the extent

of their applicability to the respondent, are set out in full in Libelant's Exhibits 10A, 11A and 12A contained in the copy of the "Appendix to Appellee's Brief," certified by the Clerk of the Court of Appeals.

The preamble to Decree No. 1827 (May 1932) states, among other things, that "it is the duty of the Government to offer protective measures on the basis of strict justice, for the population in general, as well as for such enterprises who by their activities are aiding in the economic development of the country."

Decree No. 178 (October 1945) did not disturb the language of Article I (quoted above), but the amended form of Article 3 (also quoted above), deleted certain defenses of "public service companies" from the 1932 version, and in addition to liberalizing in Article 4 the amount of recovery of damages for personal injury and death and deleting the aforementioned defenses of "public service companies," Decree No. 178 amended Article 10 by extending the Accident Law to "also apply" to companies described as "electric light and power companies or other similar companies that may produce damages due to the inexperience, drunkenness, maliciousness, ineptitude or carelessness of the employees or because of the bad condition of their machines, lines or equipment."

A statement in the preamble of Decree No. 178 indicates that a reason for expanding the provisions of the 1932 law to grant more liberal "indemnifications" [recoveries] for "persons that make use of the public service" was that "The present law that regulates indemnifications for causes of accidents or deaths happening to persons that make use of the public services of transportation is deficient, as it was issued in a time when the present problems were not contemplated in the same way."

Decree No. 1051 (April 1954) makes the provisions of Article I "applicable to the State, when it is fully evidenced that it operates as a civil or commercial company, for profitable purposes."

Statement

This action was commenced by the petitioner in the United States District Court for the Southern District of New York by the filing of a libel invoking the admiralty jurisdiction of 28 U.S. Code, § 1333(1). The *Gasbras Sul* had moored in the petitioner's sea terminal for discharge of liquid propane. While so moored during the night of September 16-17, 1956, a severe storm (called a "chubasco") arose and the vessel dragged her anchors and caused severe damage to petitioner's sea terminal. The petitioner sought recovery for this damage. The *Gasbras Sul* was a Norwegian flag steamship, owned by a Norwegian steamship company and carrying its cargo of petroleum products (liquid propane) for profit under a charter with the consignee.

Petitioner's sea terminal is located in an open roadstead near San Jose, Guatemala, and consists of four underwater pipelines and appurtenances, the longest of which extends into the sea about 2,175 feet perpendicular to the shore line. Therefore, vessels mooring at the seaward end of these pipes are rather close to shore.

Consequently the U.S. Hydrographic Office Sailing Directions for San Jose ("Libelant's Damage Exhibit 9" contained in the "Appendix to Appellee's Brief"), urge, "Caution—Anchorage further seaward is advisable during the rainy season when 'Chubascos' (secs. 1-28 and 7-20) occur without warning. Vessels have dragged anchor at such times."

The parties agreed that the liability of respondent is governed by the law of Guatemala.

The petitioner contended that the respondent was negligent in not moving the vessel further seaward before the severe chubasco storm struck, and that, alternatively, the respondent was liable without proof of fault under Guatemalan law.

The action was tried before Judge Feinberg, in February 1964, as a non-jury admiralty action solely on the question of liability. After the entry of an interlocutory decree in favor of the petitioner on September 10, 1964, a final judgment was entered on March 1, 1967, upon the report of a Special Master, granting petitioner a recovery in the sum of $62,733.12.

Judge Feinberg's opinion dated July 10, 1964 contained the Trial Court's findings of fact and held that the master of the S.S. *Gasbras Sul* was negligent in not moving the vessel out to the open sea and away from the sea terminal moorings before the severe chubasco storm struck, on the basis of evidence adduced by testimony in open court and by deposition.

The parties did not dispute that the Guatemalan law of negligence is similar to the concepts of negligence in Anglo-American law, but the petitioner urged and offered proof that, the Guatemalan law also imposed liability for damages caused by the ship irrespective of negligence on the part of the respondent. However, the Trial Court held that it was "not necessary" to deal with the question of liability irrespective of negligence since it found that the damage was due to the "ordinary negligence" of the operation of the S.S. *Gasbras Sul* by its captain."

In so holding, the Trial Court found that the master of the *Gasbras Sul* could have successfully left the sea terminal with reasonable seamanship stating that: "I conclude on the evidence before me that reasonable seamanship could have successfully accomplished departure."

The Trial Court also found that (1) the master should have stopped discharging his cargo, in view of the worsening weather, and departed before dark if he believed that darkness would have made departure too risky, particularly as the master "had been warned not to stay at the sea terminal overnight in view of the likelihood

of chubascos, even if this meant stopping the unloading process before completion; the weather was clearly not improving and the reasonable course would have been to get out to sea before darkness fell," (2) The master was negligent in continuing to discharge cargo after dark and not moving out to sea when the weather took a turn for the worse, and (3) the master should not have kept the vessel moored overnight, when the discharge was completed at about 9:30 p.m. when the reasonable course was to move the vessel out to sea as quickly as possible, before the severe chubasco struck at 3 a.m. and caused the vessel to drag its anchors and damage the petitioner's installation.

The respondent's appeal to the Court of Appeals was confined by its brief solely to the contention that the Trial Court's holding of negligence was based on "hindsight" and that this was reviewable as a question of law. The respondent expressly renounced any review of the Trial Court's findings of fact in its "Appellant's Brief" stating in both the "Table of Contents" and in subdivision 1 of its first point, at page 3, that

> "The facts as found by the Trial Court, are not contested on appeal,"

and at page 2 it emphasized that

> "Appellant accepts the findings of fact made by the Trial Court, but asserts error in that the Trial Court substituted its own judgment for that of the captain of the *Gasbras Sul,* and ruled, on the basis of hindsight * * *."

The petitioner's brief ["Appellee's Brief"] in the Court of Appeals, in addition to its argument that the trial court's decision was correctly grounded in negligence on the unchallenged findings of fact, also urged that, in view of the new Rule 44.1 in the 1966 Amendments to the Federal Rules of Civil Procedure, the District Court's judgment could

also be sustained under Guatemalan law as a question of law, without a showing of negligence.[2]

On November 29, 1967, the Court of Appeals rendered a lengthy and discursive fact finding opinion, in trial de novo style, which did not even take notice of the negligence findings of the Trial Court until halfway through the discussion. Weighing the testimony of the master of the *SS Gasbras Sul* above the other evidence, the Court of Appeals concluded that the holding of negligence was reviewable as a question of law "not subject to the clearly erroneous rule", and concluded that the District Court's holding should be reversed on the ground of "hindsight". The opinion made no mention whatever of the respondent's express concession that the Trial Court's findings of fact were "not contested" on the appeal.

The Court of Appeals (disregarding the petitioner's proposition that new Rule 44.1 of the Federal Rules of Civil Procedure was the basis of its argument) ruled further that the judgment of the District Court could not be sustained without proof of negligence under Guatemalan law because the petitioner "bears the burden of persuasion on this and has not sustained it". The testimony of the foreign law experts was not credited and improperly treated in the outmoded evidentiary approach as "in diametric opposition."

A timely petition for rehearing was filed insisting that new Rule 44.1 had outmoded the "burden of persuasion" requirement in the ascertainment of the applicable

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[2] A copy of the respondent's brief in the Court of Appeals ["Appellant's Brief"] as well as the other respondent's brief ["Appellant's Reply Brief"] and a copy of the petitioner's brief ["Appellant's Brief"] have been certified by the Clerk of the Court of Appeals, as the direct source for ascertaining the issues raised below. A copy of each of the three printed appendices filed by the parties in the Court of Appeals (which contain among other things, the relevant foreign law "material" contemplated by Rule 44.1) has also been so certified.

foreign law, and that "unchallenged findings of fact by the Trial Court" had been disregarded or changed. Yet the Court of Appeals' opinion of November 29, 1937 had been stated to be based on the premise that the Trial Court's holding of negligence was being reviewed "as a question of law" that was "not subject to the clearly erroneous rule".

The response of the Court of Appeals to that petition for rehearing was a second opinion, dated January 4, 1968, denying the petition, (387 F2d 580). That opinion adhered to its previously stated "burden of persuasion" concept of foreign law, in an extended restatement of its views, urging that the petitioner "had failed in its burden of proof" because the Trial Court, "about two years before the change in the rule," had described the proof of foreign law on strict liability as "confusing and often contradictory." The Court of Appeals further stated that "we reach no different conclusion if we apply the new Rule 44.1. Since Esso [the petitioner] is the plaintiff, it still has the task of persuasion that it has a good cause of action and it has failed to do so," and also stated that "we are not persuaded" that the Supreme Court of Guatemala "would not have similarly construed the statute narrowly in this case."

Apart from the non-existence of a Guatemala case involving a claim against a steamship company, directly specified in Article I as one of the companies subject to the Guatemala Accident Law, the Court of Appeals indicated that it was "not persuaded" seemingly because a Guatemala Supreme Court decision had held that "the owner of a private automobile" [in astounding contrast to the "steamship" company expressly specified in the statute] was not within the scope of strict liability under the Guatemala Accident Law. This conjectural basis of non-persuasion is hardly comprehensible, as the Guatemalan Court was not "narrowly" construing the statute, as the Court of Appeals conjectured, but had simply held that

the general "means of transportation" phrase in Article I of the Accident Law, in contrast with the "steamship" and other transportation companies particularly described in Article I did not expand the statute to apply to the owner of a private automobile, for "individual persons who are not transporters" were manifestly outside the purview of a statute which the Guatemalan Court recognized as imposing liability on the type of companies specified therein "even when there does not exist fault".[3]

Also incomprehensible is the implication in the suggestion of the Court of Appeals that a preamble to the 1945 amendments to the Accident Law [the preamble, among other things, noted the deficiencies in the law with respect to "users" of transportation, to be remedied by the 1945 amendments and in no way disturbed the unrestricted 1932 language of Article I, but, instead expanded the limits on death and personal injury recoveries in Articles 4 and 5] could conceivably be held by the Guatemalan Courts to have reduced the entire broadly stated 1932 Accident Law solely to the benefit of such "users". This would indeed obliterate the language of the preamble to the original 1932 Accident Law that its purpose is "to offer protective measures on the basis of strict justice, for the population in general, as well as for such enterprises who by their activities are aiding in the economic development of the country."

Finally, persisting in its failure to mention the completely and expressly unchallenged nature of the Trial Court's findings of fact, the Court of Appeals, after adhering to its view that the Trial Court's findings of negligence were reviewable and reversible as a question of law, concluded for the first time, that the [unchallenged] findings of fact, which it had changed, were mistaken (under the "clearly erroneous" test mentioned in three cited cases), stating that "we conclude that, though there is

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[3] The decision is *Beteta* v. *Bressani* (the "Mini" case), discussed at page 26 of this petition.

some evidence to support the findings made, as the reviewing court, we are, on the entire evidence, left with the definite and firm conviction that a mistake was committed."[4]

A timely petition for reconsideration of the January 4, 1968, decision and for a rehearing *en banc* was denied on February 6, 1968, without opinion, in two memorandum orders.

REASONS FOR GRANTING THE WRIT

I.

In reviewing and setting aside unchallenged findings of fact that were expressly accepted and not contested by the appellant, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Unchallenged findings must be taken at their face value and the established boundaries of judicial review are that an appellate court, in adversary litigation, may not search for error in the record as to matters that are expressly or impliedly accepted by the parties as correct and withdrawn from review by an appellant's argument or brief.

Thus, in *Steuart & Bro.* v. *Bowles,* 322 U.S. 398 (1944), this Court noted at page 398 that when none of the findings is challenged they are "taken at their face value, as they must be," and in *United States* v. *National Lead Co.,* 332 U.S. 319 (1946), when the appellant's brief stated that "we accept the cancellation and the injunction against con-

[4] Comparative statements in the petition for rehearing showing some of the changes made in the Trial Court's findings of fact had evidently induced the Court of Appeals to acknowledge that it had actually set aside the District Court's findings by making such changes.

tinuation or renewal," the Court stated (at page 326) that, "Accordingly, the finding of the District Court * * * is accepted here without further discussion."

Concessions made in briefs are of such overriding importance that they may even control the disposition of a criminal case. In *Haynes* v. *United States*, 390 U.S. 85, 101 (1968), this Court determined the case in accordance with the concession in the "Brief for the United States 8" that, "the United States has conceded that petitioner's privilege against incrimination must be found to have been impermissibly infringed, if his contentions as to the proper constructon of §§ 5581 and 5841 are accepted."

Indeed, in this case, the concessions in the respondent's brief in the Court of Appeals, that "the facts as found by the Trial Court, are not contested on appeal" and, that the "Appellant accepts the findings made by the Trial Court" are express admissions that the facts are correct for the purposes of appeal and the equivalent of an agreed statement of facts.

It is fundamental that an appellant's statement in a brief, or statements in a brief that are not denied in a responsive brief, will be regarded as admissions by an appellate court and it will "consider the statements in the brief as admissions of facts." *Young & Vann Supply Co.* v. *Gulf F. & A. Ry. Co.* (5 Cir., 1925), 5 F.2d 421, 423, and *Isthmian Steamship Co.* v. *California Spray-Chem. Corp.* (9 Cir., 1962), 300 F.2d 41, 49. See also 5 C.J.S. Appeal & Error, §§ 1342-1345.

In *Garrity* v. *Bartolomeo* (2 Cir., 1945), 149 F.2d 604, 606, the Court of Appeals said that, "Upon the argument the appellants expressly withdrew all questions except that raised in the first point of their brief; consequently, we confine our decision to that alone, * * *"; and in *Socony Vacuum Transp. Co.* v. *Gypsum Packet Co.* (2 Cir., 1946), 153 F.2d 773, 775, it held that it would not review findings that have not been challenged.

II.

The decision of the Court of Appeals raises important questions concerning the application of the 1966 amendments to the Federal Rules of Civil Procedure to the review of admiralty cases and the effect of new Rule 44.1 on the determination of foreign law.

The review of a finding of negligence as a question of law is in essential conflict with the Ninth Circuit.

1.

The 1966 amendments to the Federal Rules of Civil Procedure govern all issues on appeal, including issues heard and decided by the Trial Court before the effective date of the amendments.

The lengthy fact finding discussion of the Court of Appeals in this admiralty action and its allusion to the Trial Court's comments as having been made "about two years before the change in the rule" would indicate that the Court of Appeals may not have fully considered the effect of the 1966 amendments as abolishing all vestiges of trial *de novo* in admiralty and that these amendments, including new Rule 44.1, were applicable on appeal, as of course and not by sufferance, to all cases on review after July 1, 1966. The second provision of the order for the 1966 amendments reads, at 383 U.S. 1031:

> "2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies."

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), applied the 1966 amendments to the Federal Rules of Civil Procedure to an action then on appeal even though the version of the rule in question was not in existence at the time of the District Court's decision and said at pages 135, 136:

> "For there is now in effect a new version of Rule 24(a) which in subsection (2) recognizes as a proper element in intervention 'an interest' in the 'transaction which is the subject of the action'. This Rule applies to 'further proceedings' in pending actions. 383 U. S. 1031".

As noted in Moore's Federal Practice Rules Pamphlet of 1966, at page 1425, the Supreme Court had included in its order a provision for the application of the 1966 amendments to "all further proceedings in actions then pending" rather than by another addition to Rule 86 of the Federal Rules of Civil Procedure. In *Klapprott* v. *United States*, 335 U.S. 601 (1949) the court in applying a 1948 amendment to the Federal Rules of Civil Procedure to an appeal from an order made before its effective date said at pages 608, 609:

> "Amended Rule 60(b) of the Federal Rules of Civil Procedure became effective March 19, 1948. That was after the District Court denied the motion to set aside this default judgment and after affirmance of the District Court's action by the Court of Appeals. For these reasons the Government contends that amended Rule 60(b) should not be applied here. In some respects, the amended rule grants courts a broader power to set aside judgments than did the old rule. Petitioner should be afforded the benefit of the more liberal amended 60(b). For Rule 86(b) made amended 60(b) applicable to 'further proceedings in actions then pending' unless it 'would work injustice' so to apply the rule. It seems inconceivable that one could think it would work any injustice to the Government to measure the petitioner's rights by this amended rule in this

> case where all he asks is a chance to try the denaturalization proceedings on its merits. Amended Rule 60(b) should be applied."

Since it has never been and could not be properly urged that the application of the amended rules "would work injustice," they must be applied to this case, as of course.

Accordingly, reference to the comments of the trial court that the proof of foreign law was a "welter of confusing and often contradictory testimony and exhibits," that the district court's opinion was filed "about two years before the change in the rule" and "the trial court's description of the state of the evidence was correct and that the plaintiff-appellee had failed in its burden of proof" had no real relevance to a Rule 44.1 disposition of the foreign law question on the appeal. The rule provides that the Court may consider any relevant material or source "whether or not submitted by a party or admissible [as evidence] under Rule 43."

2.

Rule 52(a) is now completely and directly applicable to an admiralty case of its own effect, free of the vestiges of trial *de novo* review and it is legally impossible to show that admitted findings are clearly erroneous within that rule.

Amended Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure shall govern procedure "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty," and, accordingly, Rule 52(a) directly prohibits the appellate court in an admiralty case from setting aside findings of fact unless they are actually clearly erroneous.

McAllister v. *United States*, 348 U.S. 19, 20 (1954), did hold, *as a matter of decisional law* prior to July 1, 1966, that "In reviewing a judgment of the Trial Court, sitting without a jury in admiralty, the Court of Appeals may

not set aside the judgment below unless it is clearly erroneous," but the reference in that decision to Rule 52(a) of the Federal Rules of Court Procedure was only by analogy and not by its direct effect. That decision had the effect of discouraging trial *de novo* practice in admiralty appeals as a practical matter but some Court of Appeals panels tended to consider a review of an admiralty case with more flexibility than a review on appeal of a non-admiralty case.

McAllister did not remove all doubts concerning the permissible extent of review in admiralty case and the displacing of a District Court's decision by another factual decision, as in this case, is a remnant of the *de novo* approach. Thus, in *Panaview Door & Window Co.* v. *Reynolds Metals Co.* (9 Cir., 1958), 255 F.2d 920, which was decided in 1958 (some four years after the 1954 *McAllister* decision), the Court said at page 926:

> "The Federal Rules of Civil Procedure, give this Court no power to make new independent findings upon evidence which this Court did not hear. Trial de novo is not permitted under our present system, *except perhaps in admiralty.*" (Italics supplied.)

The existence of vestiges of trial de novo after the *McAllister* decision was noted in *United States* v. *Staples* (9 Cir., 1958), 256 F. 2d 290, at page 293:

> "While it is true that most courts of appeal give lip service to the doctrine that a trial de novo before appellate judges in admiralty is possible, the unconscious repetition of this refrain has generally no significance in reality. This Court has claimed the right to draw inferences from the evidence contrary to finding of the court of first instance. But the overwhelming weight of recent authority in appellate courts accords to findings of trial judges in admiralty the same respect given to those of courts in other civil cases."

It further said at footnote 10; page 294:

> "10. Some procedural vestiges of the theory of trial de novo in appellate courts remain firmly grounded." [Citing cases]

All vestiges of trial de novo such as that contained in the rescinded Admiralty Rule 45, [which provided for further proof on appeal in the Court of Appeals or the Supreme Court 254 U.S. 698] have now passed into history.

It is abundantly clear that the respondent, who had conceded the correctness of the Trial Court's findings of fact, had no standing to succeed on its appeal to the Court of Appeals unless it showed that erroneous legal tests (similar to the legal tests stated in a charge to a jury) were applied to those findings. It is manifestly a legal impossibility to show that admitted findings of fact are clearly erroneous. In *United States* v. *DuPont & Co.*, 351 U.S. 377 (1956), this court indicated what an appellant "must show" to succeed in overturning findings of fact, at page 381:

> "For the United States to succeed in this Court now, it must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a) of the Rules of Civil Procedure. See United States v. United States Gypsum Co., 333 U.S. 364, 393-395. We do not try the facts of cases de novo. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597."

When the Court of Appeals improperly changed the unchallenged Trial Court's findings of fact by substituting its own version it could no longer apply legal tests to those improperly reversed findings as a basis for its decision.

The second opinion of the Court of Appeals failed to identify the "mistake" in the Trial Court's findings and merely recited the talismanic "mistake was committed" phrase referred to in three cases: *Guzman* v. *Pichirilo*, 369

U.S. 698, 702 (1961); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); and *American President Lines, Ltd* v. *Towboat Seneca* (2 Cir. 1967), 384 F. 2d 511, 515. Those cases did not involve and did not authorize a review of uncontested findings. In *Guzman* this Court admonished and reversed the Court of Appeals for improperly setting aside findings and reinstated the judgment of the District Court. In *American President Lines* the Court of Appeals, after thorough analysis, lacked the firm conviction of any "mistake" in the trial judge's decision and affirmed. On the other hand, *United States* v. *Gypsum* reversed the trial court on a direct appeal mainly because the lower court had dismissed an anti-trust suit in the teeth of virtually unassailable documentary evidence and had also demanded more proof of intent than the law requires.

Actually, the Court of Appeals previously stated ground that "negligence" is a question of law is misleading, particularly when it is derived from general notions of prudence that are inextricably intertwined with a factual pattern of conduct based on all of the evidence presented to and heard by the fact finding trial judge.

The District Court's finding of imprudence was based upon the obligations imposed on the master of the *S.S. Gasbras Sul* in the context of all the evidence, and it was improper for the Court of Appeals to minimize the warnings given to the master or to enlarge the Trial Court's version of the risks involved.[5]

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[5] For example, the Court of Appeals exaggerated the seven floating buoys that marked the location of the underwater pipes and hoses as presenting a formidable risk to the 325 foot radar equipped vessel. In reality, they were so small in comparison to the huge bulk of the vessel that it could ride over them. As the Trial Court's findings show, they were slim cylindrical floating buoys (6 feet long by 14 inches in diameter) attached to flimsy ¼-inch chains. Other evidence, in support of the Trial Court's unchallenged findings of fact, showed that, in leaving the terminal, the vessel would move away and not toward these marker buoys.

The Court of Appeals clearly breached the requirements of Rule 52(a), now free from all vestiges of the admiralty concepts of trial *de novo,* and its determination that the petitioner "failed to meet its burden of proving negligence" in the face of uncontested findings must be rejected.

3.

The review of a finding of negligence as a question of law is in essential conflict with the Ninth Circuit.

The following excerpt from a decision of the Ninth Circuit, *Rederi A/B Soya* v. *S.S. Grand Grace* (9 Cir., 1966), 369 Fed. 159, at pages 162-3, shows an essential conflict with the Second Circuit's view that a determination of negligence is reviewable as a question of law and not subject to the clearly erroneous test of *McAllister* v. *United States, supra,* 348 U.S. 19 (1954):

> "But appellant contends, in effect, that a determination on the question of negligence, however labeled, is not a finding of fact, but is a conclusion of law and so is not to be tested by the clearly erroneous rule.
>
> No decision has been called to our attention in which it was held that a determination on the question of negligence is exclusively one of law. However, the Second Circuit has adopted the view that because the determination of that question involves first the formulation and then the application of a standard of conduct to evidentiary facts found to be established, a judge's determination on the question of negligence is not entitled to the benefit of the clearly erroneous rule in admiralty or any other type of action in which Rule 52(a) is generally applicable. See Romero v. Garcia & Diaz, Inc., 286 F.2d 347, 355-356 (2d Cir. 1961). The Second Circuit has recently held that its view in this regard is not in conflict with McAllister v. United States, 348 U.S. 19, 75 S.Ct. 6. Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-778 (2d Cir. 1966). See, also, Socash v. Addison Crane Company, 120 U.S.App.D.C. 308, 346 F.2d 420, 422

(D.C.Cir. 1965), concurring opinion of Judge Bazelon.

Apparently, most if not all of the other courts of appeals deal with the question of negligence as if it were one of fact, subject to the clearly erroneous rule. See the decisions handed down in the District of Columbia, First, Fourth, Fifth, Sixth, Eighth and Tenth Circuits, collected in 5 Moore's Federal Practice, 2d ed., § 52.03, pages 2616, 2624 and 1965 supplement thereto."

The case at bar illustrates that the tendency of a Court of Appeals, when it views a finding of negligence to be reviewable as a question of law, is to evaluate the evidence in such a fashion as to improperly displace the fact finding functions of the Trial Court.[6] This practice contravenes Rule 52(a) of the Federal Rules of Civil Procedure and should not be countenanced by this Court, and should be resolved in accordance with the practice followed in the Ninth and other Circuits.

4.

New Rule 44.1 has abolished the former requirement that a party has the burden of persuasion of the foreign law in support of its cause of action in the traditional sense of burden of proof, and the federal courts must determine foreign law from any relevant material or source whether or not submitted by a party.

New Rule 44.1 has freed the federal court from the often frustrating requirement of "burden of persuasion" of the foreign law, in the traditional sense of burden of proof in support of a party's cause of action.

The "persuasion" concept was noted in *Tidewater Oil Company* v. *Waller* (10 Cir., 1962), 302 F.2d 638, 640, where the court said that "having pleaded Turkish law to sustain

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[6] The Court of Appeals for the Second Circuit said: "Whether the facts constitute negligence is not subject to the clearly erroneous rule and this court reviews the trial court's decision on that issue as a question of law [citing cases]."

his right of recovery, Waller [the plaintiff in that case] is under the burden of going forward with proof of it at *the risk of nonpersuasion.*" (Italics added.)

Rule 44.1 goes further than merely stating that "The court's determination shall be treated as a ruling on a question of law." It also provides that "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43".[7]

It is no longer appropriate for a federal court to refrain from decisively determining a foreign law question because the testimony of foreign law experts is stated by the court to be "in diametric opposition" or that their testimony is "confusing and often contradictory," as the court may then determine the foreign law from sources other than the "material that has been presented by counsel in partisan fashion." The Advisory Committee's note (page 842 of Moore's 1966 Pamphlet) reads in part as follows:

> "In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel."

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[7] Rule 44.1 with its history and advisory committee note is published in Moore's Federal Practice Rules Pamphlet of 1966, at pages 840 to 843, inclusive, and reads: "Rule 44.1. Determination of Foreign Law. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law."

In Volume 54 of the Georgetown Law Journal at page 1244 the writer, in pointing out the difficulties of proof under the old common law rule similar to that of the plaintiff-appellee said:

> "It can be seen, then, the rules of evidence make it difficult, if not impossible, to present an issue of foreign law to the court.
>
> "If a party is unable to prove the law, the failure may be determinative of his cause."

The writer of that Law Journal article also noted at pages 1244 and 1245:

> "New rule 44.1 was adopted in awareness of the inequitable results a failure to prove foreign law often produces. It provides that 'the court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.' This clause permits federal courts to free themselves of the heretofore inhibiting rules of evidence.
>
> "The rule is unquestionably salutary. Under it, the court can engage in its own research and raise its own issues (as it does in the case of domestic law), without being limited to properly admitted evidence."

See also, Miller: Federal Rule 44.1 and the "Fact" Approach to Determine Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich.L.Rev. 615, 692-702 (1967); *First National City Bank* v. *Compania de Aguacergs, S/A,* (5 Cir., March 11, 1968), reported in part at 36 U.S. Law Week 2581.

Nor is a plaintiff faced with the prospect that his success may be entirely dependent upon his obtaining a foreign law advocate most likely to persuade, since that fortuity has now been removed from the judicial process, and, as in the process of determining domestic law, a foreign advocate now merely assists the court in reaching a legal determination. A federal court may no longer dismiss a foreign law claim solely on the basis of "non-persuasion."

In the context of the 1966 amendment, a conflict between lawyers respecting the governing rule of foreign law may not create a barrier to relief under that law, any more than a conflict between lawyers or courts on domestic law may lead to a denial of relief.

The Trial Court's problem, as stated by it on July 10, 1964, that "the general federal rule is that the law of a foreign country must be proved as a fact" was no problem for the Court of Appeals after July 1, 1966 when the "material" presented to the Trial Court was ample to resolve the question of foreign law pursuant to new Rule 44.1; utilizing, by analogy, the process of determining law suggested by *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), and its progeny. *Cf. Commissioner* v. *Bosch,* 387 U.S. 456 (1967).

Yet, the Court of Appeals confined its holding on the foreign law question to a "burden of persuasion" outmoded by Rule 44.1 and in the context of its two opinions it is clear that "burden of persuasion" meant the abolished "burden of proof" or "risk of non-persuasion concept." The phrases "burden of persuasion" and "burden of proof" are synonymous and interchangeable. *Cf., Johnson* v. *Barton* (W.D. of Va., 1966) 251 F. Supp. 474, 476.

The petitioner had a clear right to request the Court of Appeals to sustain the judgment in its favor by an actual determination of the Guatemalan law, pursuant to new Rule 44.1. As this court said in *Jaffke* v. *Dunham, Trustee in Bankruptcy,* 352 U.S. 280, 281, "A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

The agreed translations of the Guatemala Supreme Court decisions, the Guatemala Accident Law and the other laws of Guatemala collected as exhibits and printed in the various appendices for the Court of Appeals and in the testimony of the foreign law advocates were clearly before the Court of Appeals as part of "any relevant material or source including testimony" to consider "in determining foreign law" pursuant to Rule 44.1.

5.

The Guatemala decisions and other material show that the Accident Law of Guatemala contemplates that all companies described in that law, whether in Article 1 or Article 10, including the respondent "steamship" company, are liable for damage to the property of enterprises in Guatemala without a showing of fault. The Court of Appeals should determine that question of foreign law accordingly in harmony with the purpose of new rule 44.1.

Article I of the Accident Law of Guatemala provides a recovery for what is called "objective" responsibility ("liability without fault") in addition to "subjective" liability ("liability with fault"). So the Supreme Court of Guatemala determined in *Beteta* v. *Bressani* (the 'Mini' case) on February 22, 1955, when it concluded that an owner of a private automobile was not subject to Article I "objective responsibility" as owner of the private vehicle "even when there does not exist fault on his part" because the private automobile owner was not within the purview of the other "means of transportation" phrase following the "steamship" and similar companies mentioned in Article I.[8]

Indeed, the April, 1954 Amendment (Decree No. 1051) which makes Article I "applicable to the State", specifies it is only applicable when it operates a steamship, railroad or other such means of transport mentioned in Article I as a "commercial company for profitable purposes".

The only rational premise of *Beteta* v. *Bressani* is that when a transporter is expressly subject to Article I of the Accident Law it is liable under the doctrine of

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[8] The agreed translation of *Beteta* v. *Bressani* is printed in full at pages 88c-100c of the "Appendix to Appellant's Reply Brief" certified by the Clerk of the Court of Appeals. The agreed translation of *de Barillas* v. *Compania Distribuidora Guatemalteca* (the "Shell" case), discussed below, is printed in full at pages 110c-120c of that Appendix.

"objective responsibility" without fault, and there is no doubt that the respondent "steamship" company is such a company and is identified as one of the transporters covered by that law.

The two grounds of both "objective" and "subjective" liability imposed on the gasoline distributor in *de Barillas* v. *Compania Distribuidora Guatemalteca* (the "Shell" case) [by the description given in Article 10 of the Accident Law it is as much subject to the law as the "steamship" transporter described in Article 1], supports the proposition that any company subject to the Guatemala Accident Law is liable for damage to property whether it is with or without fault.

Using the *Erie* v. *Tompkins* analogy as a guideline, the additional "without fault" ground of the "Shell" decision by the highest appellate court of Guatemala is a firm ruling and decisional precedent and not mere dictum.

In *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949) this court said at page 537:

> "The Court of Appeals concluded that the latter reason was argumentatory, the real basis of the decision being that Bullington was denied recovery on the doctrine of res judicata. But where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum. United States v. Title Ins. Co., 265 U.S. 472, 486; Massachusetts v. United States, 333 U.S. 611, 623."

The petitioner, in accordance with the protection that the preamble of Decree No. 1827 (the Accident Law) states is "for the population in general, as well as for such enterprises who by their activities are aiding in the economic development of the Country" is entitled to recover damages from the respondent without proof of fault.

To impose liability, Article 10 of the Accident Law only requires a showing that the company caused the property damage and that it is a company that "*may cause damage*"

(i.e., that it is capable of causing damage) because of the bad conditions of its "... machines, lines or equipment", without any further requirement that "subjective" fault be also proven.

The following discussion the *de Barillas* ("Shell") case is a sufficient authoritative source to sustain a determination that the respondent is liable whether it is with or without fault:

> "* * * Once over such obstacle, this Chamber feels that Compañía Distribuidora Guatemalteca Shell is obligated to repair the damages and losses for which it is being sued, according to our laws, a conclusion which has double support.— By a general juridical principle, anybody who because of his acts, neglect or carelessness causes a damage to another is obligated to repair it; two important doctrinary currents are born from that statement and both are embodied in legislation.— On one part, the objective theory contained in Articles 1 and 3 of the Accidents' Law, that only exempts from responsibility when it is proven that the damaged party, intentionally or because of his fault, has given rise to the result.— Under this aspect, it is of course not acceptable that the tank truck placed under Pezzarossi's operation depends from him, but from the distributing Company, which is responsible for the damages, as in no way may it even be stated that the damaged parties gave rise to the damaging result.— But if the question in another field, that of the subjective theory, which is in fact the opinion of this Court, in the present case, the responsibility of the Company is clear anyway; because in application of Article 10 of the Accidents' Law, amended by the 5 of Congressional Decree 189, the light and power companies and other similar which may cause damages because of the bad conditions of their machines, lines or equipment.— Without a shadow of a doubt, the companies which distribute products like gasoline appear to be regulated by this rule as those referred to as similar, because the handling of gasoline can give rise to grave accidents; and as

> to the cause or reason of the damages, it is sufficiently clear from the evidence submitted by the parties, that is the criminal proceedings contained in the certified copies of the case above mentioned, that the houses and businesses of the claimants suffered damages: first, because of the maneuvers of the employee of the Company who, in advancing the distributing truck, gave cause to movements of the hose, spraying and fire of the properties and establishments, and as Pezzarossi alleges that this attitude had as purpose to prevent the ignition of the gasoline of the tank which during those moments was being filled, that explanation, even in the case of being accepted, does not favor the Company, *because there being or not being fault on the part of Pezzarossi,* the responsibility of the defendants would only cease when proven that there was fault on the part of the damaged parties (*objective theory accepted by Decree 1827*), which point is not fulfilled, it being furthermore evident that there was no such fault; and, second, it is also evidenced in the proceedings that the driver did not carry a helper, nor was the vehicle provided with fire extinguishers (*subjective theory*), * * *." (Italics added)

In accordance with the purpose of Rule 44.1, the Court of Appeals should not only have affirmed the judgment of the District Court on its finding of negligence, but [applying the Accident Law in the same manner as the Guatemala Supreme Court did] it should have also affirmed the judgment on the ground that the respondent "steamship" company was liable "with or without fault", under the law of Guatemala.

Conclusion

The petition for a writ of certiorari should be granted, and thereupon the judgment of the United States Court of Appeals should be reversed and the judgment of the District Court in favor of the petitioner reinstated in full.

Date: April 1, 1968

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion of Feinberg, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ESSO STANDARD OIL S.A.,

Plaintiff,

against

THE SS. GASBRAS SUL, her engines, boilers, etc., and

against

A/S SOBRAL, as Owner of the SS. GASBRAS SUL,

Claimant-Defendant.

This is a libel by Esso Standard Oil, S.A., a Panamanian corporation, in rem against the S.S. Gasbras Sul, and in personam against her owner, a Norwegian corporation. Esso seeks recovery for damages allegedly caused by a collision on September 17, 1955, between the S.S. Grasbras Sul and libelant's underwater petroleum discharging installation or "sea terminal," located off the coast of Guatemala near San Jose. Both parties agree that since the collision occurred in Guatemalan territorial waters, the liability of respondent is governed by the law of Guatemala. I hold, for the reasons stated below, that the master of the S.S. Gasbras Sul was negligent in the management and operation of the vessel and that respondent is, therefore, liable in full for the damage caused to libelant's underwater installation.[1]

I

Libelant's sea terminal is used for unloading petroleum products from vessels anchored offshore. At the time of the damage complained of, the installation consisted of four parallel submarine pipelines of heavy gauge steel extending southward from the shore into the sea. The most easterly pipeline was twelve inches in diameter; the next was ten inches in diameter; and the third and fourth lines were four inches in diameter. Each pipe was ten to twenty feet from its neighbor and rested unsupported on the bottom of the sea.

The twelve inch line, which extended 2,175 feet into the ocean, was the longest, and carried fuel oil, asphalt and other so-called "dirty" products. The ten inch line was about 2,060 feet in length and carried "clean" products, such as aviation gasoline and diesel oil; the last 160 feet of this line was bent at about a twenty-five degree angle away from the twelve inch line. The two four inch lines were each about 1,900 feet long and carried liquid and vapor propane, respectively. A specially reinforced rubber hose, 150 feet long, was connected to the seaward end of each pipeline, and consisted of five thirty-foot sections connected to each other and to the pipeline by welded flanges. The twelve inch and ten inch pipeline each had a ten inch hose. The four inch lines were each attached to four inch hoses. None of the pipelines was anchored.

There was a marker buoy—a steel cylinder six feet long and fourteen inches in diameter—attached by a three-quarter inch chain, sixty-four feet long, to the seaward end of the twelve inch pipeline, another to the ten inch line, and a third to a spreader between the two four inch pipes. At the seaward end of each hose there was attached a marker buoy by a similar chain.

Three steel cylindrical mooring buoys—each about ten feet in diameter and fifteen feet long—floated on the surface. Each mooring buoy was attached to a five ton anchor by means of a two and one-half inch chain 270 feet long, and was equipped with a hook in the shape of a fish hook to receive and hold stern mooring lines from vessels unloading at the sea terminal. Neither the mooring buoys nor the marker buoys were equipped with lights.

In discharging its cargo, the procedure to be followed by a ship is to moor at a ninety-degree angle to the shoreline, with its stern shoreward and its midships, where its manifold is located, at the hose ends. The hose ends are taken aboard by means of the ship's hoisting gear and connected to the ship's manifold through which the petroleum products are discharged by air compressors on board. The ship must use both bow anchors and secure its stern with two or three lines to each of the three stern mooring buoys—one directly astern, and one off each quarter—with the assistance of a launch standing by to carry the lines out to the buoys.

The S.S. Gasbras Sul originally had been built as a dry-cargo ship, but was converted to a propane carrier, 2.490 gross tons, with an overall length of 325 feet, a beam of forty-seven feet and a summer draft of twenty feet eight inches. In converting the ship, propane gas tanks were installed in the vessel's forward and after decks extending about twelve feet above the deck. The S.S. Gasbras Sul had been chartered to the Tropical Gas Company, the consignee of the cargo of liquified propane carried by the vessel.

At 5:20 P.M., on September 15, 1955, the S.S. Gasbras Sul arrived at the pier at San Jose, under the command of Captain Odd Dahle, but in view of the late hour and the risks attendant upon mooring in the dark,[2] the captain

decided to wait until the following day to proceed to the sea terminal, which is about one and one-half to two miles farther along the coast and lies unsheltered in the open radstead. This was the fourth trip Captain Dahle had made to the sea terminal on the S.S. Gasbras Sul.[3]

At about 6:00 A.M. on the following morning, the vessel was boarded by Mr. Hermogenes Moreno, libelant's terminal superintendent at San Jose, and Mr. Arturo Bianchi Arguello, merchant manager for Tropical Gas, both of whom remained on board continuously until 10:00 A.M. the following day.[4] At this time, there were rain squalls and unusually heavy swells, but there was little wind or current,[5] and Captain Dahle proceeded to the unloading installation.

The S.S. Gasbras Sul was moored in accordance with the procedure outlined above, with two ropes to the buoy directly astern, three ropes to the starboard stern quarter buoy, and two ropes to the port stern quarter buoy.[6] While the vessel was mooring up, the weather was "worsening a little";[7] the rain had become heavier, and the wind was blowing up.[8] Captain Dahle therefore delayed operations for about an hour until the weather improved.[9] The hoses from the four inch lines were then connected to the ship's manifold, and discharge of cargo was commenced at 12:05 P.M.,[10] at which time there was a gentle to moderate breeze from the east (seven to sixteen knots on the Beaufort Scale), the temperature was seventy-two degrees, the barometer 750 and it was raining.[11]

During the day, while the ship was discharging its cargo, the weather grew progressively worse;[12] the rain continued, the wind was blowing up intermittently and the swells were becoming increasingly heavy.[13] By 5:00 P.M., the Captain realized that if he continued discharging, darkness would fall before the ship was ready to leave the sea terminal.[14] He testified that he had been concerned all day about the weather conditions,[15] and that he had con-

sidered the possibility of unmooring before darkness fell and returning the next day to complete discharging.[16] However, Moreno and Arguello had told him that the weather conditions were usual for that time of the year, and that it might continue like that for a week.[17] The Captain apparently thought that the weather would hold up sufficiently, and he decided to finish unloading with the expectation that he would still be able to leave the sea terminal that night with the assistance of a launch that was standing by to unhook the ship's lines from the mooring buoys.[18]

Captain Dahle testified that he had obtained a hurricane forecast for the Caribbean, but that the only report for waters in the area of San Jose came from Washington, and there was "nothing especially" reported for the coast.[19] However, the Captain did have some knowledge of the weather conditions for the area during that time of the year. On a previous occasion, when Captain Dahle had first moored a vessel at the San Jose sea terminal, Captain Jensen, the mooring master employed by libelant at its sea terminal, acquainted Captain Dahle with seasonal weather conditions and the characteristics of sea mooring at San Jose,[20] and particularly warned him against staying in the sea mooring overnight during the rainy season.[21] Captain Jensen specifically informed Captain Dahle that during the rainy season, which runs from May to the end of October, violent local storms, called "chubascos," frequently arise with little or no warning and strike between the hours of 6:00 P.M. and 6:00 A.M., from the east through east-northeast and northeast with wind velocities ranging from twenty to sixty miles an hour.[22] Captain Jensen also advised Captain Dahle that he should leave the mooring facilities as soon as he had completed discharge, but that if the weather got bad—for example, if there were particularly strong winds or seas—he should stop the discharge, disconnect the hoses and, if necessary, leave the terminal.[23]

By 6:00 or 7:00 P.M. on the evening of September 16, the weather conditions were worse than they had been all day,[24] and Captain Dahle ordered his crew to complete discharging and disconnect the hoses as quickly as possible, because he still contemplated leaving the terminal after the discharging was completed.[25] At 8:00 P.M., according to the vessel's log, the wind had shifted from east to east-southeast and had increased to a fresh breeze (seventeen to twenty-one knots). The temperature was seventy-one degrees and the barometer was 749.[26] By the time the hoses were disconnected, at 9:30 P.M., the weather conditions were "very bad"; the wind was much stronger, the sea was rougher, and a very heavy rain was falling.[27] Captain Dahle believed at this time that it was too dangerous for the ship to leave the sea terminal, and he decided to remain until daylight.[28] Messrs. Moreno and Arguello, as well as the chief officer, concurred in this decision.[29]

At about 3:00 A.M. on the morning of September 17, a severe chubasco struck.[30] The ship began drifting in towards the beach dragging both anchors. In an effort to maneuver the vessel away from the beach and out to sea, the mooring lines were cut loose, the engines were started, and the vessel began weighing anchors.[31] At 3:30, the starboard anchor was up,[32] but the vessel continued to drift towards shore, dragging its port anchor.[33]. The ship's second officer then noticed a mooring buoy or a marking buoy under the stern, and a few minutes later the chief engineer called up from the engine room that something was caught in the propeller and that he could not get the engine started again.[34] The Captain testified that he did not know exactly what it was that had fouled the propeller, but he thought that it was probably a buoy or a chain from one of the buoys.[35] The ship then dropped its starboard anchor, the propeller was cleared, and both anchors were weighed.[36] The vessel then proceeded out to sea where it remained until about 7:15 A.M. when the

weather improved.[37] The S.S. Gasbras Sul subsequently returned to the sea terminal, retrieved some of her mooring lines, finished unloading and finally departed later that day.[38]

A survey and inspection subsequently conducted by libelant revealed that the marker buoys that had marked the ends of the ten inch and twelve inch pipelines were missing and that another was out of place;[39] that about 680 feet of the ten inch pipeline had been turned back on itself and damaged beyond repair;[40] and that four of the five sections of the hose connected to the ten inch pipeline had been flattened out of shape.[41] The ten inch pipeline was abandoned and replaced in March of the following year.[42]

II

Libelant Esso contends that the damage to its sea terminal at San Jose was proximately caused by the negligent operation of the S.S. Gasbras Sul and was not caused by any negligence on its part. It urges that under Guatemalan law, a ship is liable for any damages proximately caused by its negligence and that, in any event, under the Accidents Law of Guatemala, a ship is liable without regard to fault.

Respondents deny that there was any negligence in the operation of the S.S. Gasbras Sul. They also contend that the design and maintenance of libelant's sea terminal at San Jose was faulty, that this contributed to the accident, and that, therefore, if respondents are found to have been negligent, each party is required to bear its own loss under the law of Guatemala. Finally, respondents deny that there is any principle of absolute liability under Guatemalan law.

The general federal rule is that the law of a foreign country is a fact which must be proved. *Black Diamond*

S.S. Corp. v. *Robert Stewart & Sons*, 336 U.S. 386, 396-97 (1949); *Walton* v. *Arabian American Oil Co.*, 233 F.2d 541, 543 (2 Cir.), *cert. denied*, 352 U.S. 872 (1956). To that end, the proctors for libelant and respondents each called an expert witness at the trial and introduced into evidence photostatic copies of certain legislative degrees contained in the Official Compilation of the Laws of Guatemala and of certain provisions of the Commercial Code of Guatemala, a copy of the Civil Code of Guatemala, translations of relevant provisions in the decrees and the Codes and of certain decisions of hte Supreme Court of Guatemala, as to all of which the witnesses testified at the trial.

Out of the welter of confusing and often contradictory testimony and exhibits, there are a few clear and undisputed facts about Guatemalan law. Under the law of Guatemala, negligence—in the same sense that the concept is used in Anglo-American law—is a basis for liability if that negligence proximately causes a collision between a vessel and a stationary object, which results in damage [43] and a shipowner is responsible for the negligence of its captain.[44] There is controversy between the parties as to other aspects of Guatemalan law—whether there is absolute liability for damages caused by a ship, whether the ship captain here is held to a standard short of absolute liability but higher than ordinary negligence, whether a collision resulting from negligence of both parties leaves the damages where they fall. However, it is not necessary to deal with these problems since I find that the damage to libelant's sea terminal was due solely to the ordinary negligence of the operation of the S.S. Gasbras Sul by its captain.

On the basis of the facts found above, I hold that the decision of Captain Dahle to stay in the sea terminal overnight was negligent under the circumstances and that this negligence was the proximate cause of libelant's damages.[45] Three instances of faulty judgment clearly emerge

from the evidence, any one of which justifies this finding. By 5:00 P.M., it was reasonably clear that the weather was not improving and was, in fact, worsening. The usual time between completion of discharging and placing the marker buoys back into the water was approximately one and one-half hours [46] and darkness had fallen about 6:30 or 7:00 P.M. the previous day.[47] Therefore, about 5:00 P.M. was the latest time for Captain Dahle to stop discharging if departure from the sea terminal was to be accomplished before darkness fell.[48] The chief reason given by Captain Dahle for not leaving the sea terminal at 9:30, when discharging and disconnecting was actually completed, was that darkness made departure too dangerous in light of the then prevailing weather.[49] Although it is true that the weather worsened from 5:00 P.M. to 9:30 P.M., nevertheless the danger attendant upon darkness would have been eliminated had discharging been stopped at about 5:00 P.M. Captain Dahle had been warned not to stay at the sea terminal overnight in view of the likelihood of chubascos, even if this meant stopping the unloading process before completion; the weather was clearly not improving, and the reasonable course would have been to get out to sea before darkness fell.

It was similarly negligent for Captain Dahle to continue discharging cargo, rather than commence to leave the sea terminal, when the weather took an even clearer turn for the worse at about 6:00 or 7:00 P.M. While it is true that cessation of unloading at that time would not have enabled the S.S. Gasbras Sul to leave the sea terminal in daylight (since departure would have been made after sundown), immediate and emergency action would have accomplished departure well before 9:30, perhaps by as much as one hour or one and one-half hours. The condition of the weather between 6:00 and 9:30 P.M. indicates that it would have been safer to leave at 8:00 or 8:30, rather than at 9:30, when Captain Dahle finally did make up his mind

as to what course to take.[50] Finally, even the decision not to leave at 9:30 was, under the circumstances, unreasonable. While it was true there were risks to unmooring and leaving in the darkness, the risks could have been appreciably lessened by cutting the lines instead of having men unmoor them. As indicated above, Captain Dahle had been specifically advised before of the danger of staying in the vicinity of the sea terminal in the chubasco season, and the weather was obviously worsening. The reasonable course would have been to get out to sea as quickly as possible, where the vessel would have been safer.[51] Had this been done, the sea terminal would not have been damaged.[52]

Respondents also urge that leaving the sea terminal, particularly in the dark, raised the danger of fouling the propeller or the rudder with the mooring lines or the chains on the marker buoys. While there undoubtedly were risks attendant on leaving, in daylight or in the dark, I conclude on the evidence before me that reasonable seamanship could have successfully accomplished departure. Respondents also rely upon a decision involving damage to libelant's sea terminal more than a year earlier when another vessel dragged her anchor during violent storms. *Esso Standard Oil, S.A.* v. *The S.S. Sabrina,* 154 F. Supp. 720 (D. Canal Zone 1957). In the portion of the case relied upon by respondents, the court held that the ship was not liable for damage to a pipeline that occurred during the second of three "chubascos". However, respondents' reliance is misplaced since the basis of the court's holding was that regardless of the alleged negligence of the vessel's captain, the vessel would still have been at its berth discharging when the second "chubasco" struck. Moreover, it does not appear from the opinion that the issue of whether the vessel was negligent in remaining at the sea terminal overnight was raised by the parties or considered by the court.

Respondents also argue that, in any event, the design and maintenance of libelant's sea terminal was faulty in various respects,[53] that this amounted to negligence on libelant's part which, at the very least, contributed to the accident and, therefore, each party is required to bear its own loss. However, the evidence does not justify the conclusion that libelant was negligent in designing and maintaining the sea terminal. The expert witnesses who testified on this point differed and, while there may be other sea terminals in existence with improved features for larger tankers,[54] I am not persuaded that libelant's terminal and equipment in the area in which it was located failed to meet reasonable standards of safety. Finally, it is true that libelant's mooring master was not available on September 16 and 17, because he was admittedly elsewhere on business,[55] but, under the circumstances of this case, this did not constitute negligence in the maintenance of the sea terminal. Nor did the absence of libelant's mooring master entitle the captain of the S.S. Gasbras Sul to rely on the advice of Moreno, libelant's terminal superintendent. Responsibility for navigation of the ship rested solely on the captain. See *Esso Standard Oil, S.A., supra*, at 724.

Accordingly, I find that libelant has met its burden of proving that the damage to its sea terminal on September 17, 1955, was proximately caused by respondents' negligence; that libelant was not negligent; and that respondents are liable to libelant for the damage so caused. The foregoing opinion shall constitute the findings of fact and conclusions of law of the Court.

Submit decress on notice.

Dated: New York, N. Y.,
July 10, 1964.

/s/ WILFRED FEINBERG,
U.S.D.J.

FOOTNOTES

1. Issues relating to damages have been reserved by the pre-trial order for later disposition.

2. Transcript of Trial [hereinafter cited as "Tr."], p. 152.

3. Tr. pp. 194, 198, 205, 207.

4. Respondents' Exhibit [hereinafter cited as "Resp. Ex."], I-1, p. 3.

5. Tr. pp. 39, 159, 217; Resp. Ex. G-1, p. 1.

6. Tr. p. 156.

7. Tr. p. 218.

8. Tr. p. 162; Resp. Ex. G-1, pp. 1-2.

9. Tr. p. 162.

10. Resp. Ex. I-1, p. 2.

11. Resp. Ex. I-1, p. 3.

12. Tr. p. 232.

13. Tr. p. 163.

14. Tr. pp. 230-231. Darkness had fallen the previous day at about 6:30.

15. Tr. pp. 234-35. The testimony of Captain Dahle was taken by deposition in Norfolk, Virginia, on February 1, 1962, and was read into the record at the trial. Tr. pp. 146-249.

16. Tr. p. 232.

17. Tr. p. 235.

18. Tr. p. 233. Captain Dahle testified that on previous occasions, he had left the sea terminal "in the middle of the night," using the same procedure that he would use during the day. Tr. pp. 165-66.

19. Tr. pp. 218-19. Although there was a walkie-talkie aboard, the Captain testified that he did not use it to obtain weather information from shoreside because he did not know whom to contact. Tr. p. 235. The ship's radar was on at all times after mooring, but did not give warning of any approaching storm. Tr. pp. 246, 265. The ship's barometer did not indicate a storm until early the following morning. Resp. Ex. I-1.

20. Tr. pp. 187, 342-43, 384.

21. Tr. p. 386.

22. Tr. pp. 342-44; see Tr. pp. 181-82, 246-47. Captain Jensen testified that he also warned Captain Dahle of another type of storm that comes up from the southeast and lasts from two to three days. Tr. p. 343.

The Sailing Directions for the cost of Guatemala state that "southerly and south-southeasterly winds, accompanied by heady squalls and frequent rains, prevail from July to October"; that "'Chubascos' . . . are frequent at night from the middle of May until October"; that they "occur without warning," and that "vessels have dragged anchor at such times." Libelant's Exhibit [hereinafter cited as "Lib. Ex."] 9.

23. Tr. pp. 384-87.

24. Tr. pp. 231, 237-38.

25. Tr. p. 231.

26. Resp. Ex. I-1, p. 3.

27. Tr. pp. 164-65; Resp. Ex. G-1, p. 2.

28. Tr. pp. 165-67; Resp. Ex. G-1, pp. 2-3.

29. Tr. pp. 167-68; 284-86.

30. Tr. p. 63.

31. Tr. pp. 251-56.

32. Resp. Ex. I-1, p. 3.

33. Tr. pp. 256, 260.

34. Tr. pp. 175-76.

35. Tr. pp. 176-77, 259, 262-63, 305. See Resp. Ex. I-1, p. 3.

36. Resp. Ex. I-1, p. 3.

37. *Ibid.*

38. Resp. Ex. I-1, p. 4.

39. Tr. pp. 77-78.

40. Tr. pp. 19-25; Resp. Ex. F.

41. Resp. Ex. F.

42. Tr. p. 25.

43. Codigo Civil de la Republica de Guatemala, arts. 2276, 2277, 1435, 1436. Lib. Exs. 15, 16, 15a (transl.). Tr. pp. 617-18.

44. Codigo de Comercio de la Republica de Guatemala, art. 86. Lib. Ex. 17.

45. *Cf.* The Havana, 89 F.2d 23 (2 Cir. 1937); The Charles H. Sella, 89 F.2d 631 (2 Cir. 1937).

46. Tr. p. 236. This time estimate included blowing the pipelines clear, disconnecting the hoses, and dropping the marker buoys.

47. Tr. p. 230.

48. This assumes that only a small amount of time would be required for letting go of the moorings. If necessary, the mooring lines could have been cut.

49. Tr. pp. 165, 169.

50. Tr. pp. 164-67.

51. Tr. p. 239.

52. Respondents rely on the defense of "Act of God" or "inevitable accident." While there is some conflict in the expert testimony as to whether the law of Guatemala recognizes this defense, *compare* Tr. p. 698 with Tr. p. 643, it is unnecessary to determine this question since, in any event, the defense applies only to those situations in which the accident would have occurred even if all precautions reasonably to be required had been taken. "To say there is no liability in such a case seems only another way of saying that liability must be based on fault." GILMORE AND BLACK, ADMIRALTY 396-7 (1957). My finding that the accident would not have occurred if Captain Dahle had exercised reasonable care therefore precludes reliance on "inevitable accident."

53. *E.g.*, respondents argue that the mooring buoys did not have self-releasing hooks, that the buoys should have been spar buoys and should have been lighted and that the pipelines were not anchored.

54. See Tr. pp. 521-40, 546.

55. Tr. pp. 388-89.

Opinion of Bonsal, *D. J.*, Overruling Exceptions to Report

(R. pp. 1993-1997)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Claimant-defendant A/S Sobral, owner of the S.S. Gasbras Sul, moves pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure for action upon its objections to the report of the Special Master filed on July 22, 1966.

After trial before Judge Feinberg, claimant-defendant was found liable for damage to plaintiff's pipeline facility in San Jose, Guatamala by reason of a collison involving its vessel S.S. Gasbras Sul. *Esso Standard Oil, S.A.* v. *S.S. Gasbras Sul,* 239 F. Supp. 212 (S.D.N.Y. 1964). By interlocutory decree dated September 10, 1964, Samuel G. Fredman was appointed Special Master "to ascertain and compute the amount of such damages and to report thereon. . . ." The Special Master conducted hearings for six days in March, April, and May, 1965, at which 749 pages of testimony were taken and numerous exhibits received in evidence. In his report the Special Master found that plaintiff had suffered damages of $47,375.56 exclusive of interest.

Claimant-defendant makes four objections to the Special Master's report: 1) that the Special Master erred in reporting that it was reasonable for plaintiff to replace the damaged pipeline rather than to repair it; 2) that assuming replacement was reasonable, a) the Special Master erred in reporting that plaintiff acted reasonably in not

salvaging any of the underwater portion of the damaged pipeline, and b) erred in reporting that the tug Taboga came to San Jose from the Panama Canal primarily to replace the pipeline; 3) that the Special Master erred in reporting that four hoses on the 10-inch lines and one hose on the 12-inch line were damaged and had to be replaced as a result of the accident in suit; and 4) that the Special Master erred in reporting that plaintiff's damages amounted to $47,375.56.

In the proceedings before the Special Master, the plaintiff had the burden of proof in establishing every item of its damage. *O'Brien Bros.* v. *The Helen B. Moran,* 160 F.2d 502 (2d Cir. 1947). As a part of that burden, plaintiff had to show by objective standards that the expenses to which it was put were reasonable. *Pan-American Petroleum & Transport Co.* v. *United States,* 27 F.2d 684 (2d Cir. 1928). As noted, however, in *Ellerman Lines, Ltd.* v. *The President Harding,* 288 F.2d 288, 290 (2d Cir. 1961):

> It is not fatal to recovery that one course of action, reasonably open but not followed, would have avoided further injury whereas another, also reasonable and taken, produced it. * * * The standard of what reason requires of the injured party is lower than in other branches of the law.
>
> * * * *
>
> . . . appellee ought not be deprived of recovery if its conduct came within the range of reason, even if the full light of reason was not, in fact, brought to bear.

Whether the plaintiff in this action acted "within the range of reason" in replacing the damaged pipeline and in making no effort to salvage the underwater portions

thereof are questions of law "fully open for appellate review." *Ellerman Lines, supra,* at 292.

These questions were the subject of dispute at the hearings before the Special Master. For example, Joe E. Ross, a professional pipeline engineer, testified on behalf of the claimant-defendant that repair of the pipeline was feasible and could have been accomplished by locating and cutting out the kinked section of the line, repositioning its displaced end, and reconnecting the two parts with a sleeve coupling. On the other hand, plaintiff's engineers testified that it would have been a waste of money to attempt to repair or salvage the pipeline and that any repair might well have proven unsatisfactory. Caleb Clement, a professional diver, testified on behalf of plaintiff that due to the sea conditions prevailing at San Jose, any attempt to repair or salvage the damaged pipeline would have been hazardous and unpredictable. The Special Master relied heavily on the testimony of Clement which he found to be "based on first hand knowledge" and discounted somewhat the testimony of other witnesses who were not familiar "with the specific situation."

Taking all factors into consideration, plaintiff acted within "the range of reason" in replacing the pipeline and in foregoing an attempt to salvage any part of the damaged line, and the Special Master's findings in this regard are adopted by the court. Rule 52(a), F. R. Civ. P.

The Special Master's findings of fact are entitled to the benefit of the "clearly erroneous" rule, *Ellerman Lines, supra,* at 291, and may be overturned only if the court, "after reviewing the entire evidence," is convinced that "a mistake was committed." *Pudda* v. *Royal Netherlands Steamship Co.,* 303 F.2d 752, 753 (2d Cir. 1962); Rule 53(e)(2), F. R. Civ. P. While there was conflicting testimony as to the primary purpose for which the Taboga

came to San Jose and as to the number of hoses damaged and replaced as a result of the accident, the Special Master's findings of fact with respect to those questions are adequately supported by the record.

Claimant-defendant objects to the Special Master's finding that plaintiff's damages amounted to $47,375.56 only insofar as that figure includes items of expenses which claimant-defendant contends, in its first three objections, were unreasonably incurred or were not in fact incurred as a result of the accident. In adopting the Special Master's findings of fact, the court overrules the first three objections, and it follows that the fourth objection is also overruled.

For the foregoing reason, claimant-defendant's objections to the report of the Special Master are overruled and the report is adopted in all respects.

Settle Final Judgment on notice.

Dated: New York, N. Y.,
February 9, 1967.

DUDLEY B. BONSAL,
U. S. D. J.

United States Court of Appeals

For the Second Circuit

Docket No. 31251

ESSO STANDARD OIL, S.A.,
Plaintiff-Appellee,

against

The S.S.GASBRAS SUL, her engines, boilers, etc., and against A/S SOBRAL, as owner of the S.S. GASBRAS SUL,

Claimant-Defendant-Appellant.

APPELLANT'S BRIEF

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for Claimant-Defendant-Appellant, A/S Sobral.

RICHARD G. ASHWORTH,
GORDON W. PAULSEN,
of Counsel.

June 30, 1967.

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[TABLE OF CASES OMITTED]

[1]

United States Court of Appeals

For the Second Circuit

Docket No. 31251

ESSO STANDARD OIL, S.A.,
Plaintiff-Appellee,

against

The S.S. GASBRAS SUL, her engines, boilers, etc., and against A/S SOBRAL, as owner of the S.S. GASBRAS SUL,
Claimant-Defendant-Appellant.

APPELLANT'S BRIEF

Statement of the Case

This is an appeal from a final judgment (37a) of the United States District Court for the Southern District of New York granting judgment in favor of appellee, Esso Standard Oil, S.A. (hereinafter "Esso") against appellant, A/S Sobral (hereinafter "Sobral"), owner of the tanker, *Gasbras Sul,* in the amount of $62,733.17, including interest. The suit was brought in admiralty to recover for damage sustained in September, 1955 by a submarine pipeline at Esso's San Jose, Guatemala sea terminal as a result of the *Gasbras Sul* having dragged anchor in a sudden tropical storm, called a "chubasco".

Trial was held in March, 1964 before then District Judge Wilfred Feinberg, whose decision and opinion (2a), filed on July 10, 1964, held that the *Gasbras Sul's* master was negligent in deciding that the conditions were not such

as to require the *Gasbras Sul* to make an emergency departure from the terminau before the "chubasco" struck. Sobral moved for reargument (R. 1848), which was denied without opinion.

By interlocutory decree (17a) dated September 10, 1964, Esso was adjudged entitled to recover its provable damages from Sobral, and the matter was referred to a special master, Samuel G. Fredman, Esq., to ascertain and compute the damages. Hearings on damages were held in the Spring of 1965, and the special master's report (entitled Report of Commissioner, 18a), filed July 22, 1966, assessed damage in the amount of $47,375.56. The parties stipulated (R. 1989) the amount of interest recoverable. Sobral filed objections to the special master's report, which were overruled by District Judge Dudley B. Bonsal (34a). Final judgment (37a) was entered on March 1, 1967, and notice of appeal (R. 2000) therefrom was filed by Sobral on March 9, 1967.

Appellant accepts the findings of fact made by the Trial Court, but asserts error in that the Trial Court substituted its own judgment for that of the captain of the *Gasbras Sul,* and ruled, on the basis of hindsight, that decisions of the shipmaster on the scene, made after consulting with his advisers, including Esso's local manager, and after carefully weighing and balancing the alternatives, were negligent simply because the event established that another decision would have avoided the accident.

The appeal also asserts error in the inclusion as provable damages (1) of routine maintenance expense which Esso would have incurred even if this accident had not taken place and (2) of the replacement cost of pipeline hoses which were not proved to have been damaged in this accident.

POINT I

The Court below erred in substituting its own judgment, based on hindsight, for that the *Gasbras Sul's* captain.

1. The facts, as found by the Trial Court, are not contested on appeal.

The tanker *Gasbras Sul* arrived at San Jose on September 15, 1955 with a cargo of liquefied propane consigned to Tropical Gas, which was using two of the four undersea pipelines at Esso's San Jose installation. This "terminal" is simply a stretch of unprotected shoreline, open to the Pacific Ocean, where four underwater pipelines run out from the beach about half a mile to a point just beyond the surf line. A vessel arriving at the terminal anchors at the ends of the pipelines, dropping both anchors and mooring to heavily-anchored buoys, and then picks up a hose to discharge cargo. This was the rainy reason, which is characterized by two unrelated natural phenomena; on the one hand, squalls and heavy swells rolling in from the open Pacific Ocean, and on the other hand, frequent "chubascos", which strike without warning at night from shorewards.

The Trial Court's opinion sets forth in considerable detail the facts leading up to the accident (5a-7a). To summarize: the *Gasbras Sul* moored and commenced discharging on the morning of September 16th in fairly bad weather, which changed back and forth during the course of the day, improving and worsening, so that when late in the afternoon it appeared that the discharge would not be completed until after dark, the master of the *Gasbras Sul*, Captain Dahle, had to decide whether to suspend discharging, put out to sea, and return the next day to resume discharging, or to stay and complete discharging before

[4]

leaving. After consulting with the local representatives of Tropical Gas and Esso who were on board, Captain Dahle determined to complete discharging, expecting that the weather would hold up. By the time the hoses were disconnected, however, the weather had become much worse. Captain Dahle again reviewed and considered the situation and decided that it would be too dangerous to attempt to leave. Captain Dahle therefore determined to remain at anchor until morning. Later that night, however, a "chubasco" struck, and before the *Gasbras Sul* could get to sea, her anchor snagged one of the four undersea pipelines and twisted it back towards shore.

The Trial Court did not find that the *Gasbras Sul* was negligent in the manner in which she moored or in the emergency action taken after the "chubasco" hit. The *only* criticism levied against Captain Dahle was that after carefully considering the alternatives, he decided against taking the extraordinary steps of putting to sea before discharge was completed or, after discharge was completed, of deliberately courting the perils of unmooring in the dark in bad weather rather than waiting until morning. In a nutshell, this appeal charges that the Court below erred as a matter of law in substituting, with the benefit of hindsight, its judgment for the considered, professional judgment made by the shipmaster on the scene, who was faced with a difficult choice between disagreeable alternatives.

* * *

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 65—September Term, 1967.

(Argued October 4, 1967 Decided November 29, 1967.)

Docket No. 31251

ESSO STANDARD OIL S.A.,
Plaintiff-Appellee,

v.

The SS. GASBRAS SUL, her engines, boilers, etc., and

v.

A/S SOBRAL, as Owner of the SS. Gasbras Sul,
Claimant-Defendant-Appellant.

Before:

FRIENDLY, HAYS and ANDERSON,
Circuit Judges.

Appeal from judgment in admiralty in the United States District Court for the Southern District of New York, Wilfred Feinberg, *Judge,* in favor of plaintiff-appellee for damage to its sea terminal at San Jose, Guatemala by defendant-appellant S.S. Gasbras Sul and owner. Reversed.

Opinion of United States Court of Appeals for the Second Circuit

RICHARD G. ASHWORTH, Esq., New York, N. Y. (GORDON W. PAULSEN, Esq., and HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y., on the brief), for Claimant-Defendant-Appellant.

WALTER P. HICKEY, Esq., New York, N. Y. (KENNETH R. ARNOLD, Esq., THOMAS J. ROMANS, Esq., and KIRLIN, CAMPBELL & KEATING, New York, N. Y., on the brief), for Plaintiff-Appellee.

ANDERSON, *Circuit Judge*:

The S.S. Gasbras Sul, sailing under the flag of Norway and owned by A/S Sobral, a Norwegian corporation, arrived at San Jose, Guatemala during the evening of September 15, 1955. Originally built as a dry-cargo carrier, she had been converted to a propane carrier by the installation of tanks, both forward and aft, which projected twelve feet above the deck. The vessel was 325 feet long with a beam of 47 feet and a summer draft of 20 feet 8 inches.

She had been chartered by Tropical Gas Company, the consignee of a cargo of liquid propane which was to be delivered at the sea terminal of the plaintiff-appellee, Esso Standard Oil S.A., a Panamanian corporation, at San Jose. The sea terminal consisted of a group of storage tanks ashore, to which were connected four pipelines which ran out into the sea in a southerly direction at right angles to the shore line, which ran east and west. The four pipelines had varying lengths and diameters: a twelve-inch line extended out 2175 feet; a ten-inch line, 2060 feet; and the two four-inch lines ran out 1900 feet. One of the four-inch lines was used to carry vapor propane and the other liquid

propane. At the outer end of each pipeline there was attached a re-enforced rubber hose, 150 feet long, designed to be picked up by a ship and connected with the outlet from the ship's tanks.

There were marker buoys at the seaward ends of both the twelve-inch and ten-inch pipelines and one marking the end of the two four-inch pipelines. There were also marker buoys at the ends of the hoses attached to the pipelines. Between these marker buoys and the shore there were three large mooring buoys, so located that a tanker, with the marker buoys abeam at amidships, could make fast to the mooring buoys with her stern lines. These two four-inch pipelines and the tanks to which they were connected on the shore were leased by Esso to Tropical Gas Company.

Early in the morning of September 16, 1955 Moreno, Esso's terminal superintendent, and Arguello, manager for Tropical Gas, boarded the Gasbras Sul. Shortly thereafter the vessel moved to the discharging berth at the sea terminal. She was moored port side to the pipelines with her starboard and port anchors, each about 45° off of the bow and each on ninety fathoms of chain. Stern lines ran to the three mooring buoys; three lines off the starboard quarter, two from the stern and two from the port quarter. All of the lines were new except one, partly used, which was still in good condition.

Mooring was completed at 0820 but further procedures were delayed for an hour because of heavy rain squalls. The taking up and securing of the hose from the four-inch liquid propane pipeline, the coupling of the connections with the outlets from the tanks, and other preliminary measures were accomplished by 1205, when discharging of the propane began. This continued until 2005 when the shore tanks were filled and the operation of disconnecting the hose began. This was fully accomplished by 2130 and the hose was let go. The Master of the vessel had intended

to put out to sea at that time but because of the deterioration of the weather he decided it would be safer to remain where he was.

The evidence showed that at that time of year the prevailing weather at San Jose is characterized by southerly and south-southeasterly winds accompanied by heavy squalls and frequent rains. When the Gasbras Sul was moored at the sea terminal about noon of September 16th, the wind was east, Force 3-4, i.e. gentle to moderate, or 7 to 16 knots, the barometer stood at 750 millimeters and it was raining. The current was setting from west to east at a rate slightly over knot, and there were swells from the south. Darkness fell between 1830 and 1900, somewhat intensified by clouds and rain. The Master described the weather as "up and down" all afternoon. The gentle-moderate wind had continued but the swells had gradually increased. Between 1800 and 1900 the weather became a little worse and by 2000 the wind had picked up to Force 5, i.e. 17-21 knots, and had commenced to veer toward the southeast. It was also showery. The swells continued to increase but the barometer had dropped only one millimeter to 749. By the time the discharging operation had been completed and the hose was let go at 2130, the combination of wind and current and the increased swells were causing the vessel to yaw badly. A torrential rain had reduced visibility almost to zero. Under these circumstances the Master would have chosen to slip his moorings, take up his anchors and stand out to sea. What prevented him from doing so was the presence of the seven marker buoys and their chains, which were unlighted; one might be seen occasionally but only by chance. Some were heavy in the water from barnacles and the weight of the chains, and they rode so low in the water and were so poorly painted that they were hard to see. They could not be

picked-up by flashlight beams which reflected back in the heavy rain.

The Captain of the Gasbras Sul was faced with a very difficult decision. The vessel had liquid propane left in some of the tanks and was less than half a mile from a lea shore. If, on the one hand, he decided to leave the mooring, he faced the very grave risk of fouling the buoys in getting under weigh, with a good chance of broaching to, followed by the beaching of the vessel, and her destruction by explosion. On the other hand, if he remained at the mooring, there was the possibility that he might be struck by a "Chubasco," a local, heavy squall which from May to October occurs frequently at night; it blows at anywhere from 20 to 60 knots from the east, accompanied by heavy rain, and lasts about 45 minutes. The Master decided that in view of the fact that he was well moored, with anchors holding and with ample scope, it was less dangerous to remain where he was than it was to attempt to leave.

The Gasbras Sul continued at her mooring without difficulty and without incident during the remainder of September 16th. At 0100, September 17th, the wind was southeast and at 0200 its velocity went down to Force 4. The sea was at Force 5, i.e. waves of eight to twelve feet from trough to crest. During the last two or three hours of September 16 and the first two and a half hours of the 17th the evidence indicates that there was no significant change in the progression of rain squalls, with possibly brief lulls in between. The combination of heavy swells and seas and the extremely limited visibility made it still hazardous to attempt to leave the mooring. Between 0230 and 0300, however, the Chubasco struck. The wind veered to the south; it increased to Force 6 (22-27 knots) and continued to rise. The swells were large and the seas were turbulent. There was practically no visibility because the

rain was so heavy. The barometer had started to drop at about 0230 and at 0300 stood at 744 millimeters. During this time the anchors began to drag. Captain Dahle immediately ordered the stern lines to be cut or let go through the chocks. When this had been done, he ordered the Chief Officer to take in the anchors. Some of the crew were stationed around the rail to try to locate buoys which occasionally showed up, sometimes on one side of the ship and sometimes on the other. The Captain had ordered the engines ahead at speeds called for by the changing circumstances, but stopped the propeller whenever there appeared to be imminent danger of fouling a buoy. Just after the starboard anchor had been broken out, and was "up and down," something [1] fouled the propeller and prevented it from turning. The Captain ordered the starboard anchor dropped under foot and both anchors let out. The vessel, which meanwhile had swung off before the wind and sea, headed up. The engineer by alternately backing and going ahead on the engine cleared the propeller. By this time the stern of the vessel was almost into shoal water and the surf. The Captain, during a lull in the down-pour, saw just off the port quarter a red buoy which marked the line of breakers. With the propulsion restored the anchors were taken in and at 0400 the Gasbras Sul with all engines ahead at full speed put out to sea where she rode out the storm and did not return to the roadstead until 0850 after the storm had abated. It was afterward discovered that in dragging her anchor the vessel caused damage to Esso's submarine pipeline and, based upon findings by a special master, the trial court awarded Esso $62,733.17. We conclude that the appellant was not liable and therefore reverse the judgment.

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[1] It was recorded in the log as a mooring line but a later survey of the vessel's stern disclosed marks which indicated that it was a buoy.

Captain Dahle had moored the Gasbras Sul at Esso's sea terminal and discharged a cargo of propane on three occasions prior to September 15-17; they were April 9, June 16 and August 3 of the same year, 1955. On April 10th, the day following arrival on the first trip, Esso's mooring master, Captain Jensen, went on board shortly after the Gasbras Sul had moored at the terminal and was preparing to discharge the cargo. He and Captain Dahle discussed mooring and unmooring and Captain Jensen told Captain Dahle about local and seasonal weather conditions. On June 16th Captain Jensen boarded the vessel before it went to the sea terminal, and he remained on board during the mooring operation. He again discussed mooring and unmooring procedures with Captain Dahle. Captain Jensen was not aboard during the visit of August 3rd and was not at San Jose September 16th-17th. In his discussions with Captain Dahle about the weather, Jensen told him of the dry and rainy seasons, that the latter starts in May and ends in October; that during the rainy season there were often southeasterly storms that usually lasted two or three days; that there could also occur between 1800 of one day and 0600 of the next, during that season, local rain squall, called "Chubascos," which have wind velocities from twenty to sixty miles per hour. Captain Jensen advised Captain Dahle that when there were very bad conditions of winds, seas or currents it would be best not to moor, but if the vessel was already moored and discharging, and conditions of sea or weather became so bad that it endangered the ship he should stop discharging, drop the hose, and leave the terminal. He also advised Captain Dahle to leave the terminal in any event once he had completed discharging.

The trial court concluded that the appellant had been negligent in the management and operation of the vessel on three separate occasions, that any and all of these acts

of negligence proximately caused the damage to appellee's underwater pipeline and that the appellant was therefore liable. The negligence found consisted of the exercise of faulty judgment on the part of Captain Dahle in not discontinuing discharging operations and leaving the terminal for the open sea on September 16 at or about 1700, also between 1800 and 1900 and after discharging had been completed at 2130. The trial court found: "The chief reason given by Captain Dahle for not leaving the sea terminal at 9:30 P.M., when discharging and disconnecting was actually completed, was that darkness made departure too dangerous in the light of the then prevailing weather. Although it is true that the weather worsened from 5:00 P.M. to 9:30 P.M., nevertheless the danger attendant upon darkness would have been eliminated had discharging been stopped at about 5:00 P.M." While this is so in retrospect, Captain Dahle did not know at 1700 or at 1800, 1900 or 2000 what the weather and sea conditions would be at 2130. Nor can it be said that he reasonably ought to have known. The weather was apparently typically erratic. There were no local weather reports or forecasts. Moreno and Arguello, though they were not seamen, were nevertheless very familiar with local weather conditions and patterns and they told Captain Dahle that the weather was likely to continue as it was for several days or a week. The Captain testified that it had been up and down all day. It was what usually prevailed at that season, with southeasterly winds, heavy squalls and frequent rains. The barometer at noon was at 750 millimeters; at about 1900 it had remained unchanged. The wind, which at noon was Force 3-4, gentle to moderate, and from the east, veered somewhat toward the southeast and gradually increased so that at 2000 it was blowing at Force 5, which was a fresh breeze. At that time the

barometer read 749 millimeters. The swells from the south had gradually increased. Surely none of these things threatened any danger to a vessel of the size of the Gasbras Sul, nor did they appear to be a prelude to a Chubasco. The rain squalls were a weather disturbance separate and distinct from the Chubasco. The former came from the sea, southeast to south, and lasted for several days; the latter came from the land, from a northeasterly to an easterly direction, and lasted about 45 minutes.

The appellee places a great deal of stress upon the trial court's finding that Captain Jensen had warned Captain Dahle not to remain at the sea terminal overnight if discharging of the cargo had not been completed before dark. Although Captain Jensen at one point said, in part, that he warned Captain Dahle "against staying in the sea mooring overnight in the rainy season," it becomes clear from the rest of his testimony as well as his own customary practice, that he did not mean that Dahle should never continue discharging cargo after dark, but that he shouldn't moor there overnight when there was no need for it, and that whenever Captain Dahle completed the discharge of his cargo after dark, he should leave the mooring. Captain Jensen nowhere suggests that he advised any master to attempt to leave the mooring under circumstances such as those faced by Captain Dahle at 2130 on September 16. As to conditions under which the discharging of cargo should be suspended and the vessel should leave the mooring Captain Jensen said "Captain Dahle was to use his own judgment as a seaman if the weather was at worse and it is hard for his ship to lay in the terminal, and if he felt in his judgment that the weather would cause possible strain or damage to his ship."

Moreover, the appellee, recognizing the hazards both to tankers and to the sea terminal inherent in the use of its

installation, located as it was in an open roadstead where erratic weather patterns prevailed, provided the services of Captain Jensen, who was an experienced master of tankers and who had extensive knowledge of local conditions of current, sea and weather. He customarily approved and made a practice of continuing the discharging of cargoes through the night hours during the Chubasco season and had done so with a tanker the day before the Gasbras Sul used the terminal and also again at the end of September, and on its previous visits the Gasbras Sul had discharged at night with Captain Jensen's knowledge and approval.

Captain Dahle was aware at 1700 that the discharging operation could not be completed until after dark. He weighed all of the circumstances and considered whether to suspend the operation and leave the terminal. He discussed the matter with Chief Officer Olsen and it was their considered judgment that "... it was not so bad that we couldn't discharge the cargo and go out after finishing." This was not a case of heedless disregard of conditions or of reckless taking of chances in plain view of imminent danger.

Likewise at 1800, 1900 and 2000, although there was a worsening of the weather and the swells, there was no evidence of conditions which showed a reasonable likelihood of damage to the ship or the installation, nor was there any sound reason to suppose that the discharging operation could not be successfully concluded, as it in fact was, or that the Gasbras Sul could not leave the mooring, after its task had been completed, and put to sea.

By 2130, when the hose was dropped, the weather conditions were very bad. Taking Captain Dahle's and Chief Officer Olsen's testimony and the other relevant evidence as a whole, it is quite clear that in spite of the state of the wind, sea and swells Captain Dahle could have and would

have left the mooring except for the one overriding consideration which was that it was virtually impossible in the torrential downpour to see where the marker buoys were located because they were unlighted. To risk departing under those circumstances would have opened up the frightening prospect of becoming hung-up on one of the buoys or its chain, broaching the vessel and inviting her complete destruction with the lives of all on board. Captain Dahle was too good a seaman not to know that he could cut or slip his stern lines which he later actually did when the Chubasco came. The appellee argues that had he done so the stern of the vessel would have fallen off to starboard as she headed into the wind and would have remained clear of the marker buoys. But this was far from proven. The vessel was subject to the confluence of a number of forces: a southeast wind, which was generally veering in a southerly direction, heavy swells from the south, a current setting north with a drift of something just over a knot. She was pitching and rolling and could not be assumed to be lying steadily headed into the southeast wind. Her anchors had to be taken in. The appellee asserts that Captain Dahle should have taken in on both anchors at once until the vessel was well clear of the marker buoys and then have taken up the starboard anchor and the port, singly, in that order. If, however, consideration is given to the relative positions of the longest pipeline's marker buoys and those of the four-inch pipes, as well as the length and position of the vessel, and the location of each of the anchors with ninety fathoms of chain out, at 45° off of the bow, there is no persuasive proof that the stern of the vessel could, under the adverse weather conditions, have remained well clear of the outer buoys. They might have been cleared if both anchors were completely taken in at the same time, but if Captain Dahle had attempted to do that, once the chains were out less than three shots or shackles, there would have been grave dan-

ger that the Gasbras Sul would have fouled her own anchors.

Captain Dahle and his Chief Officer were there on the vessel; they were experienced and competent seamen; they were first hand observers of the state of the wind and the sea and the forces operating on the ship. They also knew the ship and how she was responding to those forces. After giving careful consideration to the situation, the Captain decided that the safer course was to remain at the moorings. He was not guilty of negligence in so deciding. There was nothing to indicate that early the next morning a Chubasco would follow hard on the heels of the southeasterly storm. He had a general warning from the United States Hydrographic Office Sailing Directions and also from Captain Jensen that Chubascos occurred frequently during the rainy season. But he was not advised and no evidence was ever offered as to whether or not a Chubasco was likely to follow a southeasterly storm, whether its force would under those circumstances be greater or less, or that it could come from the south-southeast and south rather than its usual direction from the northeast quadrant. Nor was Captain Dahle told that the coming of a Chubasco was so frequent that it was likely to come every night or the majority of nights or so often that discharging operations at the sea terminal had to be suspended every day before dark. In sum, no information was available and no warning was given Captain Dahle which would support the conclusion that he was negligent in failing to heed it.

When the Chubasco struck about 0230 to 0300 on the morning of September 17th and the Gasbras Sul began to drag her anchors, the vessel was in a perilous situation. Her doom was almost sealed when she ran afoul of a buoy which jammed in the stern and stopped her propeller. The Captain's prompt order to drop the starboard anchor

under foot and the speedy execution of the order by the Chief Officer checked the bow from swinging further to port and brought it up to the wind; and the engineer's instantaneous action in alternately applying the power ahead and astern freed the propeller. The vessel was favored by a certain amount of good fortune but that alone would not have saved her. The measures taken to meet this sudden and grave crisis demonstrated a very high degree of professional skill and competency on the part of the Master and showed that the Gasbras Sul had well trained and well disciplined officers and men.

Captain Jensen was the best qualified expert produced by Esso. He had not only been a master of tankers operating in Central American waters, but as the mooring master for Esso at San Jose, he had a thorough knowledge of local conditions and the use of the sea terminal. Yet his testimony does not suggest that Captain Dahle used poor judgment or in any way displayed a lack of professional skill in his management and operation of the Gasbras Sul at San José on September 15-17, 1955, with the minor exception that in his opinion Captain Dahle should have used three mooring lines from the vessel's port quarter rather than two. Captain Dahle had used three lines from the starboard quarter as added protection against the vessel's moving against the marker buoys which were on the port hand. What Captain Jensen failed to consider, however, was that when Captain Dahle moored the vessel at the terminal the current was setting east and tending to carry the vessel toward the marker buoys, at a time when the east-southeast wind was gentle to moderate. In any event the propriety of placing two instead of three lines to the mooring buoy off of the port quarter had no effect on subsequent events.

We conclude that the appellee failed to meet its burden of proving negligence on the part of the appellant. We

are satisfied that Captain Dahle did not act in disregard of reasonable prudence and due care but exercised his professional skill and considered judgment in the light of the circumstances existing and reasonably foreseeable at each of the times in question.

Whether the facts constitute negligence is not subject to the clearly erroneous rule and this court reviews the trial court's decision on that issue as a question of law. *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F. 2d 774, 776 (2 Cir.) *cert. denied* 385 U. S. 835 (1966); *Ellerman Lines, Limited* v. *The President Harding*, 288 F. 2d 288, 291-292 (2 Cir. 1961); *Romero* v. *Garcia & Giaz, Inc.*, 286 F. 2d 347, 355-56 (2 Cir.) *cert. denied*, 365 U. S. 869 (1961); *Skibs A/S Dalfonn* v. *S/T Alabama*, 373 F. 2d 101, 106 (2 Cir. 1967).

We have also said that the trial court's "finding should ordinarily stand unless the court manifests an incorrect conception of the applicable law." *Radovich* v. *Cunard Steamship Co.*, 364 F. 2d 149, 152 (2 Cir. 1966).

Here the trial court erred in not passing upon each of what it considered Captain Dahle's three mistakes in judgment, i.e., in deciding not to leave the mooring at 1700, at 1800-1900 and at 2130, in the light of circumstances known at each of those times and what was reasonably foreseeable at each of those times. By viewing each occasion retrospectively in the light of all that occurred through the morning of the next day, it imposed upon Captain Dahle a duty to foresee future happenings which were mere possibilities and of which there was, at the time he exercised his judgment, no evidence.[2] The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of

[2] Opinion below in this case, 239 F. Supp. 212 (S. D. N. Y. 1964).

discretion in deciding what to do, provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong. *The Mohegan,* 28 F. 2d 795, 796 (2 Cir. 1928); *Farrell Lines, Ins.* v. *The S/S Birkenstein,* 207 F. Supp. 500, 509 (S. D. N. Y. 1962); *Olsen* v. *Luckenback,* 238 Fed. 237, 240 (S. D. N. Y. 1916)

The appellee asserts that even if the appellant is held not to have been negligent, the vessel and owner should be responsible for the damage to the pipeline and hose because by statute,[3] Guatemalan law, which applies, provides for liability without fault—an issue which on its view the district court was not required to determine. Esso bears the burden of persuasion on this but has not sustained it. Apart from doubt whether the legislation creates a regime of strict liability, as Esso contends, or merely relieves persons suing transportation companies from having to show an agency relationship with "the persons entrusted with the vehicles," the preambles to the 1945 amendment imply that the legislation operates only in favor of users of the service. No case has been cited to us in which other persons have been permitted to recover without a showing of fault. The testimony of the experts is, as so often, in diametric opposition, and we see no basis for crediting libellant's expert as against respondent's.

The judgment below is reversed and the libel is dismissed with costs.

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[3] The Guatemalan Accident Law referred to consists of Legislative Decree No. 1827 promulgated May 10, 1932 as amended and supplemented by congressional decrees Nos. 178 and 1051 promulgated October 31, 1945 and May 5, 1954, respectively.

United States Court of Appeals

FOR THE SECOND CIRCUIT

ESSO STANDARD OIL, S.A.,
Plaintiff-Appellee,

against

The *S.S. Gasbras Sul,* her engines, boilers, etc., and

against

A/S Sobral, as Owner of the *S.S. Gasbras Sul,*
Claimant-Defendant-Appellant.

PETITION FOR REHEARING

Plaintiff-appellee, Esso Standard Oil S.A., respectfully requests a rehearing and a reconsideration of the Court's decision of November 29, 1967, with respect to the issue of Guatemalan law and the issue of negligence, for the reasons below stated.

Reason for Rehearing

I

It is respectfully submitted that, in disposing of the issue of Guatemalan law on grounds of burden of persuasion, this Court overlooked the fact that principles of burden of proof no longer apply to questions of foreign law.

Formerly foreign law was decided as a fact to be proved as any other fact subject to rules of evidence and burdens of proof.

By virtue of Rule 44.1 of the Federal Rules of Civil Procedure (effective July 1, 1966) the question of foreign law is now treated as a question of law to be determined by the Court after considering any relevant material or sources including those submitted by the parties.[1]

Although the trial of this case took place prior to the effective date of Rule 44.1, the trial court, having determined liability on the basis of negligence, found it unnecessary to reach the further question whether Guatemalan law provided for liability without fault, as Plaintiff-appellee contended, and did not do so. The necessity for resolving this issue arose for the first time on this appeal when this Court determined to reverse the trial court on the issue of negligence. Accordingly, when it first became necessary to resolve the question of Guatemalan law, the new rule was in effect and, it is submitted, it should have been resolved in accordance with Rule 44.1 as a question of law, in the light of all available sources.

The provisions of the Accidents Law of Guatemala are not disputed. Only their interpretation and application are called into question. The doctrine of burden of proof applies only to questions of fact and not to questions of law such as the interpreation of a statute. *Walling* v. *California Conserving Co. Inc.* (D.C. Cal.), 74 F. Supp. 182 (affirmed *sub. nom. McComb* v. *Hunt Foods,* 167 F2d 905 cert. den. 335 U.S. 845). Consequently, the process of determining foreign law is now essentially the same as reaching a conclusion on any question of domestic law on which

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1. Rule 44.1 states, in part:
"* * * The Court in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. *The Court's determination shall be treated as a ruling on a question of law.*" (Emphasis supplied.)

the rights of the parties depend.[2] Indeed, the Guatemalan law contains precepts for the interpretation of statutory provisions not unlike those used in Anglo-American jurisprudence (87c).

As to questions of domestic law which are unsettled, Courts are frequently called upon to make a decision after considering the materials furnished by the parties and their own research and cannot avoid doing so on grounds that one party or the other has not persuaded the court that the law is one way or the other.

Therefore, it is respectfully submitted, that under Rule 44.1 the question as to the meaning and application of the Accident Law of Guatemala should be resolved as would any similar question of domestic law. The record before the Court contains translations of the decrees in question, decisions of the Guatemalan courts, the testimony of Guatemalan lawyers and other materials. The weight of authority represented in these sources is to the effect that Appellant is liable without regard to fault. The only contradiction of this consists of speculations by Appellant's expert as to possible alternative interpretations which he failed to document or to support by valid or rational argument.

Since this is the first opportunity to respond to Appellant's reply brief on the Guatemalan law question, which had not been discussed in the Appellant's main brief, the fallacies of Appellant's position will be outlined in an Appendix to this petition captioned "Appendix of Guatemalan Law."

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[2] Cf. the *Erie R. Co.* v. *Tompkins* approach to the resolution of state law in *Commissioner* v. *Bosch,* 387 U.S. 456 (1967) and the decision of this Court on remand at 382 F2d 295. For a revealing discussion of Rule 44.1 see 54 Georgetown Law Journal, pp. 1241-1247 (1966).

II

In reversing the Trial Court on the question of negligence this Court said that it was doing so under the rule of the decisions of this Court that the question of negligence is a question of law not subject to the "clearly erroneous" rule (Slip Op. 410). In *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F2d 774, 776 (2 Cir.), this Court repeated its explanation of the meaning of its rule given in *Romero* v. *Garcia & Drog, Inc.*, 286 F2d 347, 355 (2 Cir.), that "the determination of negligence involves first the formulation and then the application of a standard of conduct to the evidentiary facts found to be established". This Court also indicated that it was not proscribed from using the "standard" concept by *McAllister* v. *United States*, 348 U.S. 19, because there was no discussion in the Supreme Court's opinion "directed at what could be considered application of a legal standard to established facts * * *"[3]

At page 2 of Appellant's Brief it was stated that "Appellant accepts the findings of fact made by the Trial Court, * * *".

Nevertheless, in reaching its decision to reverse on negligence, this Court has in effect tried the case *de novo* by disregarding or modifying unchallenged findings of fact by the Trial Court. By so doing it has substituted its views of the relative risks which it used as a basis for reversal for those of the Trial Court which were based on personal observation of certain of the witnesses who testified in this area such as Captain Jensen, Captain Craven and Captain McKay. A few examples will suffice:

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[3] Apparently this is a minority view among the Circuits. Cf. *Rederi A/B Soya* v. *SS. Grand Grace*, 369 F2d 159 (9 Cir.—1967).

TRIAL COURT

"* * * While there were undoubtedly risks attendant on leaving (the mooring), in daylight or in dark, I conclude on the evidence before me that reasonable seamanship could have successfully accomplished departure. * * *"

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"* * * (The Captain) faced the very grave risk of fouling the buoys in getting under weigh, with a good chance of broaching to, followed by the beaching of the vessel, and her destruction by explosion". (Slip Op. 401)

* * *

"* * * The combination of heavy swells and seas and the extremely limited visibility made it still hazardous to attempt to leave the mooring." (Slip Op. 401, 402)

"* * * Captain Dahle could have and would have left the mooring except for the one overriding consideration which was that it was virtually impossible in the torrential downpour to see where the marker buoys were located because they were unlighted. To risk departing under those circumstances would have opened up the frightening prospect of becoming hung up on one of the buoys or its chain,

[4] The finding below was that the marker buoys were cylinders 6 feet long by 14 inches in diameter secured by a ¾" chain. Thus they were relatively small and attached to a flimsy chain compared to the great bulk of the vessel. These views also fail to take into account the fact that the vessel had radar and other navigational aids by which the Master could keep oriented with his surroundings at all times.

TRIAL COURT	COURT OF APPEALS
	broaching the vessel and inviting her complete destruction with the lives of all on board." (Slip Op. 407)
"* * * Captain Dahle had been warned not to stay at the sea terminal overnight in view of the likehood of chubascos, *even if this meant stopping the unloading process before completion;* * * *" (Emphasis added) (10a, 11a)	"* * * it becomes clear from the rest of (Captain Jensen's) testimony as well as his own customary practice that he did not mean that Dahle should never continue discharging cargo after dark, but that he shouldn't moor there overnight when there was no need for it, and whenever Captain Dahle completed the discharge of his cargo after dark, he should leave the mooring. * * *" (Slip Op. 405)

The burden of the Court's decision is that the Trial Court reached its conclusions on negligence based on "hindsight". If this were true, the hindsight would be involved in the "application" of the standard of conduct to the facts and this application, of course, would be subject to review under the rule of this Circuit. However, as shown above, in reversing the conclusions of the Trial Court, this Court was required to change or modify findings of fact which were not challenged.

This leads inevitably to the conclusion that this Court has now vastly expanded the scope of review on ques-

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[5] The evidence is that a Mooring Master acts as an adviser only (70a, 84a). He does not control discharging or when it shall be done. The Master remains in command at all times (McKay-T555). Hence it is not accurate to say Captain Jensen had "his own customary practice".

tions of negligence which under the rule in this Circuit heretofore had been limited to the formulation and application of a standard of conduct to findings of fact and did not encompass review of findings which are unchallenged or not clearly erroneous.

This Court should not expand its rule on the scope of review on questions of negligence beyond what it has been heretofore and in effect reinstate the trial *de novo* as a function of an Appellate Court. As this is a matter which to begin with is a minority view among the Circuits and transcends in importance this single case it is suggested that consideration of this matter *sua sponte* by the Court *en banc* might well be in order.

Conclusion

It is respectfully submitted that the Court should grant this petition and on rehearing should reverse its decision and should affirm the judgment below either on the Trial Court's findings or on findings by this Court that Guatemalan imposes liability on the Appellant.

Dated: December 14, 1967

KIRLIN, CAMPBELL & KEATING,
WALTER P. HICKEY
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[APPENDIX OF GUATEMALAN LAW OMITTED.]

Opinion on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 65—September Term, 1967.

(Submitted December 14, 1967 Decided January 4, 1968.)

Docket No. 31251

ESSO STANDARD OIL S.A.,

Plaintiff-Appellee,

v.

The SS. GASBRAS SUL, her engines, boilers, etc., and

v.

A/S SOBRAL, as Owner of the SS. GASBRAS SUL,

Claimant-Defendant-Appellant.

Before:

FRIENDLY, HAYS AND ANDERSON,

Circuit Judges.

PETITION FOR REHEARING

WALTER P. HICKEY, Esq., CHARLES N. FIDDLER, Esq., Kirlin, Campbell & Keating, New York, N. Y. 10005, *Attorneys for Plaintiff-Appellee.*

Opinion on Petition for Rehearing

ANDERSON, *Circuit Judge*:

The plaintiff-appellee has petitioned for rehearing on two grounds: the first is that this court did not apply the amended Rule 44.1 F. R. Civ. P. which made the court's determination of applicable law of a foreign country a ruling on a question of law rather than an issue of fact, as it was prior to July 1, 1966; and the second is that this court was wrong in overruling the trial court's conclusion that the Master of the Gasbras Sul was negligent.

It should be noted that although the district court, as stated, was not ultimately required to render a conclusion as to the effect of any strict liability provision in Guatemalan law on the present case, it did find that the only clearly proven facts about Guatemalan law were that negligence, proximate cause and resulting damage followed the same concepts as those in Anglo-American law. Otherwise the proof of foreign law was a "welter of confusing and often contradictory testimony and exhibits . . ." The district court's opinion was filed July 10, 1964, about two years before the change in the rule. In reviewing the record on this point, we were satisfied that the trial court's description of the state of the evidence was correct and that the plaintiff-appellee had failed in its burden of proof. We reach no different conclusion if we apply the new Rule 44.1. Since Esso is the plaintiff, it still has the task of persuasion that it has a good cause of action and it has failed to do that. In its petition for rehearing, Esso cites the Guatemalan Supreme Court's decision in *DeBarillas et al.* v. *Compania Distribudor Guatemalteca Shell* (1954), as deciding both that the Accident Law imposed a regime of strict liability and that recovery was not limited to "users" of transportation services. But the Court made it quite clear that its decision was based not on its con-

struction of the provisions of the Accidents' Law which are involved in this case,[1] but on another section in which recovery is based upon fault.[2] Moreover, in *Beteta* v. *Bressini* (1955), the Supreme Court narrowly construed the relevant provisions of the Accident Law in holding that the owner of a private automobile was not the "owner of any means of transportation, by land, water, or air" and

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[1] The Guatemalan Accident Law referred to in pertinent parts read as follows:

"Article 1—The railroad, steamship, tram, automobile, airplane companies and the owners of any means of transportation, by land, water, or air, shall be severally responsible in civil action, with the perpetrators or accomplices for the damages and losses that are caused by the persons entrusted with the vehicles even when the person that causes them is not an employee of said companies or enterprise, provided the person in charge of the vehicles had entrusted them to another even in a transitory manner.

"Article 3—The responsibility referred to in Article 1 of this decree ceases when it is proved that the damaged party has given rise, intentionally, to the resulting damage, or loss, or when he acted in manifest violation of the regulations issued by the Executive Branch with respect to public services of transportation. Those obligated to the payment of the indemnification shall be the only ones called upon to prove this defense."

[2] The Court ruled:

". . . if the question in another field, that of the subjective theory, *which is in fact the opinion of this Court,* in the present case, the responsibility of the Company is clear anyway; because in application of Article 10 of the Accidents' Law, amended by the 5 of Congressional Decree 189, the light and power companies and others similar which may cause damages because of the *bad conditions* of their machines, lines or equipment.—Without a shadow of a doubt, the companies which distribute products like gasoline appear to be regulated by this rule as those referred to as similar, because the handling of gasoline can give rise to grave accidents . . ." (Emphasis supplied.)

refused to allow recovery without a showing of fault. Consequently, we are not persuaded that the Court would not have similarly construed the statute narrowly in this case, and would have denied Esso's claim, in the light of the preambles to the 1945 amendment,[3] on the ground that recovery was restricted to users of transportation services.

The second ground alleged by the petitioner is that this court "in effect, tried the case de novo and substituted its views of the relative risks which it used as a basis for reversal . . ." of the trial court's conclusion that it was negligent of Captain Dahle not to have left the terminal at 2130. However, we simply pointed out that the trial court should judge the conduct of the master of a vessel in the light of the circumstances which he faced at that time (to use petitioner's example, at 2130, September 16, 1955) and not as they may have appeared to one looking back at them several hours or several days later. It was then incumbent upon the trial court to decide whether, under those circumstances, a reasonably prudent master of a vessel like the Gasbras Sul would have considered the risk of departure from the terminal as excessive. As this was not done by the trial court, it committed an error of law. With

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[3] "WHEREAS:

It is the duty of the State to provide for the safety of persons that make use of public services of transportation, by means of legal provisions that obligate the owners of such services and the persons entrusted with the management of the vehicles, to use the highest degree of care and attention in the performance of their duties;

"WHEREAS:

The present law that regulates indemnifications for causes of accidents or death happening to persons that make use of the public services of transportation is deficient, as it was issued in a time when the present problems were not contemplated in the same way; . . ."

regard to appellee's assertion that this court arbitrarily changed the trial court's finding concerning the precise nature of the warning given Captain Dahle by Captain Jensen, as well as its claims concerning other findings in the case, we conclude that, though there is some evidence to support the findings made, as the reviewing court, we are, on the entire evidence, left with the definite and firm conviction that a mistake was committed. *Guzman* v. *Pichirilo*, 369 U. S. 698, 702 (1961); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948); *American President Lines, Ltd.* v. *Towboat Seneca, et al.*, — F. 2d — (2d Cir. Docket #31247, Decided October 19, 1967).

The petition for rehearing is, therefore, denied.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 31251

ESSO STANDARD OIL S.A.,
Plaintiff-Appellee,

against

THE SS. GASBRAS SUL, her engines, boilers, etc., and

against

A/S SOBRAL, as Owner of the SS. GASBRAS SUL,
Claimant-Defendant-Appellant.

PETITION FOR RECONSIDERATION OF THE COURT'S SECOND DECISION, DATED JANUARY 4, 1968, AND FOR A REHEARING *EN BANC*

I

Plaintiff-appellee requests reconsideration of the Court's second opinion and decision dated January 4, 1968 and a rehearing *en banc* because of what appears to be a departure from established boundaries of judicial review,

when this Court determined, for the first time on the petition for rehearing, that a mistake had been made in findings which were *accepted and not contested* by the appellant and "though there is some evidence to support the findings made * * *."[1]

This relief is requested also because this Court apparently still overlooks that it is now the function of courts under new Rule 44.1 F.R.C.P. to make a determination upon issues of foreign law, from any available source (as in domestic law), without regard to principles of evidence, burden of proof or "task of persuasion" and that the new rule applies, as of course, to appeals from cases tried before the effective date of the new rule.

These are matters of importance which go beyond this particular litigation and are of importance in nearly all cases which involve uncontested findings of fact and issues of foreign law. See *Walters* v. *Moore-McCormack Lines, Inc.* (2 Cir. 1963) 312 F.2d 893.

II

Rule 17 (a)(1) of the rules of this court requires the appellant's brief to state the "errors claimed" and (with the exception of questions concerning jurisdiction of the

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[1] Despite the appellant's concession that the fact findings were "not contested", this court concluded:

> "With regard to appellee's assertion that this court arbitrarily changed the trial court's finding concerning the precise nature of the warning given Captain Dahle by Captain Jensen, as well as its claims concerning other findings in the case, we conclude that, though there is some evidence to support the findings made, as the reviewing court, we are, on the entire evidence, left with the definite and firm conviction that a mistake was committed."

A comparative statement showing the changes of some of the district court's findings by the new findings of this court is contained at pages 5 and 6 of the first petition for rehearing.

subject matter) the brief of the appellant, at least in a purely private and adversary property damage action, confines the scope of review to the errors thus presented and, of course, excludes any question expressly eliminated.

The "Table of Contents" of appellant's brief designates subdivision 1 of its first point, and recites at page 3, that

> "1. The facts, as found by the Trial Court, are not contested on appeal"

and at page 2 its brief emphasizes that the

> "Appellant accepts the findings of fact made by the Trial Court".

Thus, it is manifest that the appeal is grounded solely on the contention that the trial court, on the facts it found, erred as a matter of law by allegedly ruling "on the basis of hindsight".

It is beyond the established boundaries of judicial review for an appellate court, in adversary litigation, to search for error in the record as to matters that are expressly or impliedly accepted by the parties as correct and withdrawn from review by an appellant's argument or brief.

Thus, in *Garrity* v. *Bartolomeo* (2 Cir. 1945), 149 F.2d 604, 606, this court said that "Upon the argument the appellants expressly withdrew all questions except that raised in the first point of their brief; consequently we confine our decision to that alone, * * * ". See also *Socony Vacuum Transp. Co.* v. *Gypsum Packet Co.* (2 Cir. 1946), 153 F.2d 773, 775, holding that this court will not review findings that have not been challenged, and *A. Schrader's Sons* v. *Wein Sales Corporation* (2 Cir. 1925), 9 F.2d 306.

Likewise, in *Dower* v. *United Ail Lines, Inc.* (9 Cir. 1964), 329 F.2d 684, 685, the court ruled that, because the

appellant failed to specify or argue an assertion of error in its brief, "the point is deemed abandoned, and accordingly the issue will not be considered on this appeal".

It is fundamental that statements made in briefs, or statements in briefs that are not denied in responsive briefs, will be taken as true by an appellate court. See 5 C.J.S. Appeal & Error, Sec. 1342-1345; *Lawkins* v. *City of New York,* 272 App. Div. 920, affirmed 297 N.Y. 747, and *Isthmian Steamship Co.* v. *California Spray-Chem. Corp.* (9 Cir. 1962), 300 F.2d 41, 49.

The second opinion fails to identify the "mistake" that "was committed" in the trial court's findings. It merely recites the talismanic "mistake was committed" phrase referred to in the three cases cited at page 919 of that opinion: *Guzman v. Pichirilo,* 369 U.S. 698, 702 (1961); *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948); and *American President Lines, Ltd.* v. *Towboat Seneca* (2 Cir. 1967), 384 F.2d 511, 515.

However, the cases cited did not involve and do not authorize a Court to review uncontested findings accepted by the parties.

In *Guzman* the Supreme Court simply admonished and reversed the Court of Appeals for improperly setting aside findings *and reinstated* the judgment of the district court. In *American President Lines* this court, after thorough analysis, lacked the firm conviction of any "mistake" in the trial judge's decision and *affirmed.* On the other hand, *United States* v. *Gypsum* reversed the trial court on a direct appeal mainly because the lower court had dismissed an antitrust suit in the teeth of virtually unassailable documentary evidence and had demanded more proof of intent than the law requires.

III

New Rule 44.1, as well as all the other 1966 amendments of the Federal Rules of Civil Procedure, is directly applicable to an action pending on appeal even though the rule did not exist at the time of the trial court's decision. The Supreme Court's order of February 28, 1966 specifically makes the 1966 amendments and additions to the Federal Rules of Civil Procedure applicable to "all further proceedings in actions then pending". 383 U.S. 1031 (bound volume) and page 1031 of the Preliminary Reprint of 384 U.S. Part 4. The second provision of the Supreme Court Order reads:

> "2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings or actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies."

In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Supreme Court applied one of the 1966 amendments to the Federal Rules of Civil procedure to an action then on appeal even though the amended rule was not in existence at the time of the decision of the district court from which a direct appeal had been taken, and said at pages 135, 136:

> "For there is now in effect a new version of Rule 24(a) which in subsection (2) recognizes as a proper element in intervention 'an interest' in the 'transaction which is the subject of the action'. This Rule applies to 'further proceedings' in pending actions. 383 U. S. 1031".

As noted in Moore's Federal Practice Rules Pamphlet of 1966, at page 1425, the Supreme Court had included in its order a provision for the application of the 1966 amendments to "all further proceedings in actions then pending" rather than by another addition to Rule 86 of the Federal Rules of Civil Procedure. In *Klapprott* v. *United States,* 335 U.S. 601 (1949) the court in applying a 1948 amendment to the Federal Rules of Civil Procedure to an appeal from an order made before its effective date said at pages 608, 609:

> "Amended Rule 60 (b) of the Federal Rules of Civil Procedure became effective March 19, 1948. That was after the District Court denied the motion to set aside this default judgment and after affirmance of the District Court's action by the Court of Appeals. For these reasons the Government contends that amended Rule 60 (b) should not be applied here. In some respects, the amended rule grants courts a broader power to set aside judgments than did the old rule. Petitioner should be afforded the benefit of the more liberal amended 60 (b). For Rule 86 (b) made amended 60 (b) applicable to 'further proceedings in actions then pending' unless it 'would work injustice' so as to apply the rule. It seems inconceivable that one could think it would work any injustice to the Government to measure the petitioner's rights by this amended rule in this case where all he asks is a chance to try the denaturalization proceedings on its merits. Amended Rule 60 (b) should be applied."

Since it could hardly be urged that the application here of new rule 44.1 "would work injustice", that rule must be applied in the present posture of this case.

Accordingly, reference to the comments of the trial court that the proof of foreign law was a "welter of confusing and often contradictory testimony and exhibits", that the district court's opinion was filed "about two years before

the change in the rule" and "the trial court's description of the state of the evidence was correct and that the plaintiff-appellee had failed in its burden of proof", has no present relevant significance.

IV

It would appear from the following language (page 916 of the second slip opinion) that the court overlooked the explicit application of new Rule 44.1 of the Federal Rules of Civil Procedure to actions pending on appeal after the effective date of the 1966 amendments, whether or not the rule was in effect at the time of the trial court's decision:

> "The district court's opinion was filed July 10, 1964, about two years before the change in the rule. In reviewing the record on this point, we were satisfied that the trial court's description of the state of the evidence was correct and that the plaintiff-appellee had failed in is burden of proof. We reach no different conclusion if we apply the new rule 44.1. Since Esso is the plaintiff, it still has the task of persuasion that it has a good cause of action and it has failed to do that."

Moreover, the new rule has nothing whatever to do with the old requirement of burden of persuasion in support of a party's cause of action. The court's role in determining foreign law is now free from the restraint of the former "task of persuasion".

The old "persuasion" restriction was succinctly stated in *Tidewater Oil Company* v. *Waller* (10 Cir., 1962), 302 F.2d 638, 640, where the court noted that "having pleaded Turkish law to sustain his right of recovery, Waller [the plaintiff in that case] is under the burden of going forward with proof of it at the risk of nonpersuasion".

Rule 44.1 goes further than merely stating that "The court's determination shall be treated as a ruling on a question of law". It also provides that "The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43".[4]

It is no longer appropriate for the court to refrain from decisively ruling on a foreign law question because the foreiegn law experts, in effect, cancel out each other and that theeir testimony is "*confusing* and often contradictory", for the court may then determine the foreign law from sources other than the "material that has been presented by counsel in partisan fashion". The Advisory Committee's note (page 842 of Moore's 1966 Pamphlet) reads in part as follows:

> "In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel."

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[4] Rule 44.1 with its history and advisory committee note is published in Moore's Federal Practice Rules Pamphlet of 1966, at pages 840 to 843, inclusive, and reads: "Rule 44.1. Determination of Foreign Law. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law."

In Volume 54 of the Georgetown Law Journal at page 1244 the writer, in pointing out the difficulties of proof under the old common law rule similar to that of the plaintiff-appellee said:

> "It can be seen, then, the rules of evidence make it difficult, if not impossible, to present an issue of foreign law to the court.
>
> "If a party is unable to prove the law, the failure may be determinative of his cause."

The writer of that Law Journal article also noted at pages 1244 and 1245:

> "New rule 44.1 was adopted in awareness of the inequitable results a failure to prove foreign law often produces. It provides that 'the court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.' This clause permits federal courts to free themselves of the heretofore inhibiting rules of evidence.
>
> The rule is unquestionably salutary. Under it, the court can engage in its own research and raise its own issues (*as it does in the case of domestic law*), without being limited to properly admitted evidence." (Emphasis added.)

Nor is a plaintiff faced with the prospect that his success may be entirely dependent upon his obtaining a foreign law advocate most likely to persuade, since that fortuity has now been removed from the judicial process, and, as in the process of determining domestic law, a foreign advocate now merely assists the court in reaching a legal determination. As in domestic law controversies, a court may *not* now determine an issue of foreign law against a plaintiff solely on the basis of "persuasion" or "non-persuasion."

In the context of the 1966 amendment, a conflict between lawyers respecting the governing rule of foreign law may not create a barrier to relief under that law, any more than a conflict between lawyers or courts on domestic law may lead to a denial of relief.

V

Putting aside the conflicting views of the advocates presented solely for the purpose of this litigation, the record contains nonpartisan sources which manifest the Guatemalan concept of liability independent of proof of fault whether it be called "strict liability", "liability without fault", "presumptive fault", or some other variation of a liability which has its source in the concept of an obligation by business enterprises whose facilities may endanger others to respond in damages for injuries to the persons or property of those who are not themselves at fault. All the statements in the cited decisions of the Guatemalan courts, and also in the 1962 pre-litigation comments of Professor Salazar printed at pages 34 to 37 of the appellee's appendix, recognize that such liability to the public in general without proof of fault was embodied in the Accident law of Guatemala. On the other hand, the letter of Professor Salazar, dated February 18, 1964, on which appellant relied, was obtained for the purpose of this litigation by appellant's expert, and is part of Dr. Arenales' cancelled out expert testimony (Appellant's Appendix to its reply brief, pages 66c, 67c, 80c, 81c).

The plaintiff's right to recover under Guatemalan law without regard to proof of fault should not be denied simply because the courts of Guatemala may not have decided a case of recovery on that basis alone, as long as

those courts recognize that such liability is an additional ground for recovery by a non-transported party such as the plaintiff-appellee.

For example, it is noted in the *Shell* case discussion at pages 29 and 30 of the plaintiff-appellee's brief that the Supreme Court of Guatemala said (page 30):

> "because there being or not being fault on the part of [the driver], the responsibility of the defendants would only cease when proven that there was fault on the part of the damaged parties."

In addition the *Mini* case discussed at pages 24, 25 and 26 of the appellant's brief also contains a view of Guatemalan law which supports the plaintiff's cause, in the statement (page 25) concerning the Accidents Law of Guatemala that

> "anyone who causes a damage, even though he may be acting lawfully, that is without fault on his part, is obligated to indemnify it."

Neither of the aforementioned cases involve transportation of the damaged plaintiff by the party held liable.

Conclusion

This court should grant a rehearing *en banc* upon the appellant's accepted and non-contested findings of fact and reconsider its "hindsight" reversal which is not supportable without changing such unchallenged findings because, based on the findings of the court below, the Master was not confronted with a choice between hazardous alternatives. The court below found that he had three opportunities to leave the berth without undue risk whereas to stay there was courting disaster.

Alternatively, if the court should reach the issue of Guatemalan law, a determination of what that law is must be made either by this court or on remand to the District Court. In either event, it is submitted that the determination should be that Guatemalan law provides for liability without fault in the circumstances of this case. All nonpartisan sources point to the ultimate determination that the law of Guatemala, as in many other civil law countries, imposes liability without regard to proof of fault on owners of instrumentalities of transport or hazardous enterprises for damage to the persons or property of others. Such strict liability has been held to be an additional ground for recovery by the Guatemalan courts irrespective of proved fault.

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Order Denying Petition for Reconsideration

31251

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

ESSO STANDARD OIL, S.A.,
Plaintiff-Appellee,

v.

The S.S. GASBRAS SUL, her engines, boilers, etc., and the A/S Sobral, as Owner of the SS. GASBRAS SUL,
Claimant-Defendant-Appellant.

A petition for reconsideration of the denial of the petition for rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
PAUL R. HAYS,
ROBERT P. ANDERSON,
Circuit Judges.

February 6, 1968.

Order Denying Petition for Rehearing en Banc

31251

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

ESSO STANDARD OIL, S.A.,
Plaintiff-Appellee,

v.

The S.S. GASBRAS SUL, her engines, boilers, etc., and the A/S Sobral, as Owner of the SS. GASBRAS SUL,
Claimant-Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

February 6, 1968.